TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. [illegible]

DAVID [illegible]

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED [illegible]

([illegible])

(25,178)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No 895.

DAVID LAMAR

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 15, 1916.

a UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which David Lamar is plaintiff in error, and The United States is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
b United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-ninth day of February, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. —. Supreme Court of the United States, No. —, October Term, 1915. David Lamar vs. The United States. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 1, 1916. William Parkin, Clerk.

1 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA
v.
DAVID LAMAR.

Petition for Writ of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit:

And now comes the above named defendant, David Lamar, by his attorney, Carl E. Whitney, and complains that in the record and proceedings had in the trial of the above entitled cause, and also in the verdict of the jury therein rendered on the 3rd day of December, 1914, the order entered on the motion in arrest of judgment and also in the rendition of the judgment in the above entitled cause in the said United States District Court for the Southern

District of New York, had at the November, 1914, term thereof, against the said defendant, on the 3rd day of December, 1914, manifest error hath happened to the great damage of the said defendant:

Wherefore, the said defendant, David Lamar, prays for the allowance of a writ of error and for such other orders and processes as may cause all and singular the record and proceedings in
2 said cause to be sent to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit under and according to the laws of the United States in that behalf made and provided, so that the same being inspected, the said Judges of the said Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct that error what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action in this Court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Second Circuit, and your petitioner will ever pray.

Dated this 21st day of May, 1915.

CARL E. WHITNEY,
Attorney for Defendant, David Lamar.

Office and Post Office Address, 15 William Street, New York, N. Y.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the District Court before you or some of you between the United States of America, complainant, and David Lamar, defendant, a manifest error hath happened to the great damage of the said defendant as is said and appears by his complaint,
3 We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the United States Court House and Post Office Building, in the Borough of Manhattan, City, County and State of New York, together with this writ, so that you have the same at the said place before the Judges aforesaid on the 21st day of June, 1915; that the record and proceedings aforesaid being inspected, the said Judges of the said United States Circuit Court of Appeals for the Second Circuit may cause further to be

done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Winess The Honorable Edward D. White, Chief Justice of the United States, this 21st day of May, in the year of our Lord one thousand nine hundred and fifteen and of the independence of the United States the one hundred and thirty-ninth.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk of the U. S. District Court for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

JULIUS M. MAYER,
Judge of the U. S. District Court for the Southern District of New York.

4 *Indictment.*

District Court of the United States of America for the Southern District of New York.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, begun and held in the City of New York, within and for the district aforesaid, on the first Tuesday of July, in the year of our Lord one thousand nine hundred and thirteen, and continued by adjournment to and including the 17th day of July, in the year of our Lord one thousand nine hundred and thirteen.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors of the United States of America within and for the district aforesaid, on their oaths present that David Lamar, alias David H. Lewis, defendant, late of the City and County of New York, in the district aforesaid, yeoman, heretofore, to wit, on the eighth day of February, in the year of our Lord one thousand nine hundred and thirteen, at the Southern District of New York and within the jurisdiction of this Court, unlawfully, knowingly and feloniously did falsely assume and pretend to be an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America, that is to say, A. Mitchell Palmer, a member of Congress representing the Twenty-sixth District of the State of Pennsylvania, with the intent, then and there, to defraud Lewis Cass Ledyard, and J. Pierpont Morgan, Edward T. Stotesbury, Charles Steele, J. Pierpont Morgan, Jr., Henry P. Davison, Temple Bowdoin, Arthur
5 E. Newbold, William Pierson Hamilton, William H. Porter, Thomas W. Lamont and Horatio G. Lloyd, who then and there composed the co-partnership of J. P. Morgan & Company, and the United States Steel Corporation, which was then and there a corporation organized and existing under the laws of the State of New Jersey, and other persons to the Grand Jurors unknown, and the said defendant, then and there, with the intent and

purpose aforesaid, did take upon himself to act as such member of Congress; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 32, U. S. C. C.)

Second Count.

And the jurors aforesaid, on their oath aforesaid, do further present that David Lamar, alias David H. Lewis, defendant, late of the City and County of New York, in the district aforesaid, yeoman, heretofore, to wit, on the eighth day of February, in the year of our Lord one thousand nine hundred and thirteen, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully, knowingly and feloniously did falsely assume and pretend to be an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America, that is to say, A. Mitchell Palmer, a member of Congress representing the Twenty-sixth District of the State of Pennsylvania, with the intent, then and there, to defraud Lewis Cass Ledyard, and J. Pierpont Morgan, Edward T. Stotesbury, Charles Steele, J. Pierpont Morgan, Jr., Henry P. Davison, Temple Bowdoin, Arthur E. Newbold, William Pierson Hamilton,
6 William H. Porter, Thomas W. Lamont and Horatio G. Lloyd, who then and there composed the co-partnership of J. P. Morgan & Company, and the United States Steel Corporation, which was then and there a corporation organized and existing under the laws of the State of New Jersey, and other persons to the Grand Jurors unknown, and to mislead, injure and deceive them and by intentional wrongdoing and by cunning art and deception, on the part of the said defendant, to prejudice and deprive the said persons and the said corporation of their just and lawful rights and them to entrap and cheat; and to fraudulently deprive the said persons and the said corporation of divers sums of money; and the said defendant, then and there, with the intent and purpose aforesaid, did take upon himself to act as such member of Congress; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 32, U. D. C. C.)

H. SNOWDEN MARSHALL,
United States Attorney.

Indictment Endorsed.

1914.
Nov. 7 Defendant pleads not guilty.
" 18 Filed demurrer.
" 19 Demurrer overruled. Judge C. W. Sessions.
" 19 Defendant pleads not guilty.
Dec. 1 Trial begun.
" 2 Trial continued.
" 3 Trial concluded. Verdict guilty as charged.
" 3 Defendant sentenced to be imprisoned for two years U. S. Pen.. Atlanta, Ga. Present Hon. C. W. Sessions.
" 3 Bail furnished in sum of $10,000.

7 *Judgment.*

At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the United States Court Rooms, in the U. S. Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 4th day of December, in the year of our Lord one thousand nine hundred and fourteen.

Present: Hon. C. W. Sessions, District Judge.

Indictment No. 5-488.

UNITED STATES
v.
DAVID LAMAR.

On motion of U. S. Attorney ordered sentence.

The Court thereupon proceeds to pass judgment and sentence the defendant David Lamar to be imprisoned for two years.

Sentence to be executed in the U. S. Penitentiary, Atlanta, Ga.

The extract from the minutes.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

O. K.
W. H. L.

(10-cent internal revenue stamp, cancelled. A. G., Jr., 2/20/15.)

8 *Demurrer.*

In the District Court of the United States of America for the Southern District of New York.

THE UNITED STATES OF AMERICA
v.
DAVID LAMAR, alias DAVID H. LEWIS.

Comes now the defendant in the above entitled cause, by his attorneys, and demurring to the indictment in the said cause, says that the same is bad in substance for the following, amongst other reasons:

1. Within the meaning of Section 32 of the Federal Penal Code, otherwise called the United States Criminal Code, a member of the House of Representatives of the Congress of the United States of America, is not an officer of the Government of the United States.

2. Within the meaning of Section 32, of the Federal Penal Code,

otherwise called the United States Criminal Code, a member of the House of Representatives of the Congress of the United States of America is not an officer acting under the authority of the United States.

3. Within such meaning, a member of the said House of Representatives is not an officer acting under the authority of an officer of the Government of the United States.

9 4. Within the meaning of the Constitution of the United States, a member of the House of Representatives of the Congress of the United States of America, is not an officer of the United States or of the Government of the United States.

5. Within the meaning of the Constitution of the United States a member of the House of Representatives of the Congress of the United States of America is not an officer of the United States or of the Government of the United States.

6. Neither the said indictment nor any count thereof charges the defendant with any offense against the United States or any law thereof.

7. Neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant assumed or pretended to be an officer acting under the authority of the United States, to wit: a member of the House of Representatives of the Congress of the United States as therein undertaken to be alleged.

8. Neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant assumed or pretended to be an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America.

9. Neither the said indictment nor any count sufficiently or at all alleges in what manner, particular or respect the defendant took upon himself to act as an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America.

10 10. Neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant took upon himself to act as an officer acting under the authority of the United States.

11. That the said indictment and the matters therein contained in manner and form are not sufficient in law and that the defendant is not bound under the law of the land to answer the same.

Wherefore, for want of sufficient indictment in -his behalf, the said defendant, David Lamar, prays judgment and that by the Court he may be dismissed and discharged from the said premises in the said indictment specified.

LOUIS B. WILLIAMS,
EVERETT T. RUSKAY,
Attorneys for Defendant.

Dated, New York, November 14, 1914.

11 *Opinion of the Court on Demmurrer to Indictments.*

United States District Court, Southern District of New York.

Before Hon. C. W. Sessions, J.

UNITED STATES OF AMERICA
against
DAVID LAMAR.

Appearances:

Hon. Snowden Marshall, United States Attorney.
Mr. Williams and Mr. Davis, for the Defendant.

The Court: The time at my disposal for the consideration of the matters presented by the demurrers in the case of the United States against Lamar has been very limited, and necessarily my views must be somewhat crudely expressed. There are two indictments, and a demurrer has been interposed to each of them, and to each count of the two indictments.

There are two grounds of the demurrer: First, that each of the indictments fails to charge an offense against this respondent in that the person whom he is alleged to have impersonated, namely, a member of Congress of the United States, is not an officer acting under the authority of the Government of the United States, and is not an officer of the United States; and, second, that the indictments are so lacking in specific and definite averments relative to
12 the essential elements of the crime attempted to be charged, that it fails to charge any offense against the respondent.

Concerning the first ground. It is earnestly insisted by counsel for the defendant that a member of Congress, either a Representative or a Senator, is not an officer acting under the authority of the Government of the United States, and is not an officer of the United States. Counsel contend that the provisions of the National Constitution, the enactments of Congress, and the decisions of the Courts negative the contention of the Government that a member of Congress is an officer of the United States. I am unable to agree with defendant's contention. It is true that a member of Congress, if a senator, is elected now by the votes of the electors of a single state, formerly was elected by the vote of the Legislature of a single state; and a member of the House of Representatives is elected or appointed by the vote of a district which may comprise a part or the whole of a single state. That goes solely to the question of election or appointment. It is also true that the Supreme Court of the United States in at least two cases has decided that a presidential elector and a member of the electoral college is not an officer of the United States. There is no similarity, however, between the two officers. The presidential elector represents solely the people by whom he is elected, or the people of the state in which he is elected. When he casts his vote for President or Vice-President, whether he does it in person, or sends it by messenger, as the custom usually is, he is simply

obeying the will and behest of the people who elected him. He is not in any sense representing the nation at large, excepting in the sense that thereby the President and the Vice-President are elected. A
13 member of Congress, whether a senator or a member of the lower House of Congress, does not in that sense of the term represent the people who elected him. It is true that in the sense of being elected by a minor district, whether by a state or a district within a state, for the purpose of election, he may be said to be the representative of that people, but in the legislative sense, he does not represent that people any more than he represents the people of another territory or district in the United States. In other words, a senator, or a congressman, a member of the House of Representatives, elected by or from a district in the State of New York, no more represents that district than he represents the people of the State of Connecticut, and every other one of the states and territories in this union. His duties are legislative. He belongs to the legislative branch of the Government, and as such he legislates or assists in legislation for the entire nation and not for any particular locality. The presidential elector represents the state from which he comes, or from which he is sent, as much as the Governor of that state represents the people of that state, except that the Governor has many duties to perform, and the elector has but one function.

I think it would surprise any member of Congress, whether senator or representative, to be told that he did not hold an office, or to be told that he was not an officer. It is certain he is an officer, and it is certain he does hold office. It is equally obvious, it seems to me, and certain that he is not an officer of the state wherein he is elected; and it seems to me, too, that it necessarily follows that he is an officer of the United States. He cannot be in the anomalous position of holding a place and being a part of one of the three co-ordinate branches
14 of the Government, and occupying the highest position in that branch of the Government, without being an officer. The decisions of the Courts of the District of Columbia commend themselves to my judgment in that respect, and I must hold against the respondent.

Coming then, to the second ground of demurrer, counsel for the defendant insist that this indictment,—I say this indictment because the two indictments are alike, and the same ground of demurrer has been alleged as to each,—that this indictment is too indefinite, and is too lacking in details of allegation concerning the essential elements of the crime attempted to be charged against the respondent. Certain rules have become established for the guidance of the Courts in determining these questions. On the one hand, there is a fundamental rule that an indictment must be so definite and so specific as to apprise and inform the respondent of the charge which is made against him, to enable him to prepare his defense, and also to enable him to plead his conviction or acquittal in bar of a subsequent prosecution for the same offense; and also, to so inform the Court that it may determine from the instrument itself whether or not an offense is charged against the defendant. On the other hand, another settled rule or test is that while conclusions, mere conclusions, may not be

pleaded and relied upon, yet ultimate facts only, and not the evidence which will establish those ultimate facts, are required to be pleaded. Testing this indictment by these rules and steering a course between the two, is it sufficient? The statute upon which the indictment is founded, as has been said by the Courts in several decisions, defines two offenses. The substance of the first offense there defined, is the impersonation of an officer of the Government of the United States, with intent to defraud either the United States, or some person, and with the like intent and purpose, of taking upon
15 himself to act as such officer. The second offense there defined is likewise an impersonation of an officer of the United States, and in such character involving necessarily the intention to defraud—obtaining or demanding of some person some valuable thing. This indictment is founded upon the first clause of the statute. The decisions of the Courts rendered concerning and upon this statute are instructive and helpful. Nearly all of them have been decisions upon indictments or relative to indictments founded upon the second clause of the statute. They are helpful, however, in this, that whether the charge made is the offense defined in the second clause of the statute, the averments of the indictment are the same, relative to the impersonation of an officer of the United States; and so far as I have been able to discover, and I think I have examined every case that was brought to me, there is no indictment in any one of those cases which, relative to the assuming or pretending to be an officer of the United States, is any more specific than the present one.

There was a case in this district, decided by Judge Holt. I have examined that indictment. It contains several counts, but in each of them there is lacking an averment as to the officer or employe which the defendant impersonated or assumed or pretended to be. Each of the several counts in that indictment is lacking in that particular, and presumably Judge Holt sustained the demurrer thereto upon that ground.

In the Ballard case, referred to by counsel on both sides, the indictment contained two counts. The second count in that indictment was like the indictment in the present case. But, in that case, the Court did not pass upon the sufficiency of the second count of the indictment at all. The defendant was convicted under
16 the first count, which charged that he demanded and obtained something of value from some person in the character of an officer of the United States, and the officer was specified in the indictment.

In the Brown case, which was referred to, the indictment was founded upon the second clause of the statute. So that the assistance which we derive from these cases and these decisions,—and the same is true of the other decisions which I have examined,—lies in the fact that the Courts seem to have passed upon the question of the sufficiency of an indictment which merely alleges that the respondent assumed and pretended to be, and impersonated a specified officer of the United States. In that regard these decisions are authorities. Moreover, this indictment alleges specifically and definitely that this respondent impersonated a specified named mem-

ber of Congress, namely, A. Mitchell Palmer, a representative of the 26th Congressional District of Pennsylvania; so that he is fully and definitely apprised of the name and character of the officer whom he was charged with having impersonated.

It is next insisted that there are no details, no data alleged relative to his intention to defraud, and that the indictment is too indefinite in that respect. So far as I have been able to discover it is never necessary to allege the evidence by which a wrongful intention or an intention to defraud is evinced, or to be established; and in that respect, too, the decisions of the Courts concerning offenses brought under the second clause of the statute, are helpful because, necessarily, there is included in the second offense an intent to defraud.

That brings us to the third contention upon this branch of the case. This indictment, after alleging the name of the officer whom this defendant is charged with having impersonated, and
17 having named the persons whom it is charged he intended to defraud, with definiteness, concludes in the language of the statute, that he took upon himself to act as such officer. The question here presented is a much closer one than the other questions. The clause of the statute that he took upon himself to act as such officer has a different meaning than the clause wherein it is stated that he assumed and pretended to be an officer. It involves action of a positive and definite character rather than a mere passive impersonation. Counsel for the defendant have cited, as bearing upon this question, decisions that have been rendered concerning the act prohibiting the misuse of the mails, and also concerning the conspiracy statute. In my judgment those decisions are not very helpful in this instance, and have little bearing upon the question here presented. Under the conspiracy statutes a conspiracy to commit a crime against the United States is made punishable only when that conspiracy is consummated by some overt act by one of the conspirators. The overt act not only fixes the status of the case, but also the situs of the case. Under the common law it was not necessary to allege an overt act. Congress has seen fit to make it necessary that there should be an overt act committed before the crime defined in the statute can be said to be complete. Necessarily, under these circumstances, the overt act must be alleged, and must be alleged specifically. Nevertheless, it is not necessary to allege the connection between the conspiracy and the overt act. It is sufficient to definitely and specifically allege the act which is plain to be an overt act. The evidence must establish the connection. In the statute that prohibits the misuse of the mails the gist of the offense, of course, is the misuse of the mails. That statute provides that any person, who having devised a scheme or an
18 *article* to defraud, in the execution or furtherance of that scheme, deposits in the mail or takes from the mail any letter or other mailable matter, shall be guilty of an offense. There the offense is made up necessarily of two elements. The mere depositing of a letter in the post-office, or receiving a letter from the post-office is not punishable and does not constitute an offense, nor does the devising of an artifice or scheme to defraud, constitute an offense

against the Government of the United States; but the two combined necessarily are essential to the consummation and completion of the offense; but the gist of the offense is the misuse of the mails. The prohibition is that the mails of the United States Government shall not be used for fraud purposes; and there again, it is necessary to allege either the depositing of a specific letter in the mails or the receipt of such a letter through and by the mails, and necessarily it becomes an element which must be defined, and must be defined definitely and specifically. Here the status does not require such definiteness. At most, it but accentuates the impersonation, and carries that a step further. It is a general impersonation, not a single instance of impersonation, not the matter of impersonation, not the evidence by which the impersonation is to be established at the trial. The defendant is apprised of the charge made against him when he is charged definitely and specifically with having impersonated a definite and specified officer of the United States, with the intent to defraud a named and specified person; and the Court is so informed that it can determine whether or not an offense is charged against him. On this branch of the case the ruling will be against the defendant.

The demurrers will be overruled.

19 . *Order Overruling Demurrer.*

At a Term of the United States District Court for the Southern District of New York, Held in the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 18th day of November, 1914.

Present: Hon. Clarence W. Sessions, United States District Judge.

UNITED STATES OF AMERICA
v.
DAVID LAMAR, alias DAVID H. LEWIS, Defendant.

The defendant David Lamar having filed his demurrer to the indictment in this proceeding, and said demurrer having duly come on for argument before this Court on the 18th day of November, 1914, and after hearing Louis B. Williams and Henry E. Davis, Esqs., attorneys for defendant in support of the said demurrer, and H. Snowden Marshall, Esq., United States Attorney, in opposition thereto, and due deliberation having been had thereon,

Now, on reading and filing the aforesaid indictment and the demurrer thereto, and upon filing the opinion of the Court, it is, on motion of H. Snowden Marshall, Esq., United States Attorney,

Ordered, that the said demurrer be and the same is hereby in all respects overruled.

C. W. SESSIONS, *U. S. D. J.*

20 United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA
v.
DAVID LAMAR.

Defendant's Bill of Exceptions.

This cause came on for trial at the November, 1914, term of the Court, before the Honorable Clarence W. Sessions, Judge, and a jury, the United States (hereinafter called Government), being represented by Messrs. H. Snowden Marshall, United States Attorney, and Harold Harper, Assistant United States Attorney, and the defendant being represented by Messrs. Louis B. Williams, Henry E. Davis and Carl E. Whitney; and thereupon the following proceedings were had and testimony given:

Mr. Marshall announced that there were three indictments against the defendant, and that the trial would be upon the first indictment only.

Thereupon the jury was selected and sworn.

Thereupon Mr. Marshall, on behalf of the Government, made the opening address to the jury.

Thereupon Mr. Williams, on behalf of the defendant, moved the Court to quash the indictment upon all the grounds urged in the demurrer filed thereto, which grounds are as follows:

That the indictment is bad in substance and insufficient in law for the following, amongst other reasons:

1. Within the meaning of Section 32 of the Federal Penal
21 Code, otherwise called the United States Criminal Code, a member of the House of Representatives of the Congress of the United States of America, is not an officer of the Government of the United States.

2. Within the meaning of Section 32, of the Federal Penal Code otherwise called the United States Criminal Code, a member of the House of Representatives of the Congress of the United States of America is not an officer acting under the authority of the United States.

3. Within such meaning, a member of the said House of Representatives is not an officer acting under the authority of an officer of the Government of the United States.

4. Within the meaning of the Constitution of the United States, a member of the House of Representatives of the Congress of the United States of America, is not an officer of the United States or of the Government of the United States.

5. Neither the said indictment nor any count thereof charges the defendant with any offence against the United States or any law thereof.

6. Neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant

assumed or pretended to be an officer acting under the authority of the United States, to wit, a member of the House of Representatives of the Congress of the United States as therein undertaken to be alleged.

7. Neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant assumed or pretended to be an officer of the Government of
22 the United States, to wit, a member of the House of Representatives of the Congress of the United States of America.

8. Neither the said indictment nor any count sufficiently or at all alleges in what manner, particular or respect the defendant took upon himself to act as an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America.

9. Neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant took upon himself to act as an officer acting under the authority of the United States.

10. That the said indictment and the matters therein contained in manner and form are not sufficient in law and that the defendant is not bound under the law of the land to answer the same.

Which motion the Court denied and exception on behalf of the defendant was duly taken to the action of the Court and duly noted by the Court.

Thereupon Mr. Williams, on behalf of the defendant, moved to quash the indictment upon the additional ground that it does not specify grounds sufficient to warrant the Court to proceed with the case, in that the language of the indictment does not bring it within the language of Section 32 of the Federal Penal Code of the United States, upon which the same purports to rest, for that the indictment in each count thereof charges the defendant with assuming and pretending to be an officer of the Government of the United States, to wit, a member of the House of Representatives, and does not charge within the language of said Section 32 that he falsely
23 assumed and pretended to be an officer acting under the authority of the United States; that the indictment is in language not within the meaning of the statute; that there is a distinction between the language of the statute, an officer acting under the authority of the United States, and the language of the indictment, an officer of the United States; and that the statute embraces not only the impersonation of an officer but of an officer acting at the time under the authority of the United States, while the language of the indictment merely embraces an officer acting merely in the capacity of an individual and not under the authority of the United States; which motion the Court denied, and exception on behalf of the defendant was duly taken to the action of the Court, and duly noted by the Court.

LEWIS CASS LEDYARD, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Marshall:

Q. You are a member of the Bar of this State?

A. Yes, sir.

Q. And you have been for many years a member of the firm of Carter, Ledyard & Milburn?

A. Yes, sir, I was, it was my former firm; Carter, Ledyard & Milburn, for a number of years. I have not been a member since I retired from active practice.

Q. And you have been twice the President of the Bar Association?

A. I have been the President once.

Q. Now, Mr. Ledyard, you knew the late Mr. J. P. Morgan, didn't you?

A. I did.

24 Q. He was a close friend of yours?

A. He was a very intimate friend of mine for many years.

Q. And Mr. Morgan died in March, in the month of March, 1913?

A. The last part of March, 1913, the last day of March, 1913.

Q. Prior to February, 1913, had you ever, so far as you know, seen the defendant, David Lamar, and talked with him?

A. I never saw him until the Summer of 1913, and I had never spoken to him face to face prior—at any time prior to the Summer of 1913, and prior to February, 1913, I had never spoken to him in any way, that I know of.

Q. Now, beginning with February 4, I believe, 1913, did you have a series of telephone calls and conversations with some person at the other end of those telephone calls?

A. I did.

Q. Did you in each instance make careful notes after the telephone conversation of what had been said in the course of the conversation?

A. I did. I dictated in each case to my stenographer, my Secretary, a careful and full record of each conversation, each of those telephone conversations that you speak of, and certain other conversations; that record being in each case dictated immediately afterwards, and on the same day, with the single exception of the last conversation I had, which was on the eighth of February, and not a telephone conversation, but another one, which was not dictated until the Monday morning following, because the eighth of February was Saturday and it occurred, the conversation, in my house, in the afternoon, and there was no stenographer there.

Q. But each of those memoranda, which you made of these telephone conversations, each one of them was dictated on the day when the telephone conversation occurred?

A. It was.

25 Q. And now, will you please tell us, refreshing your memory by your notes, if you desire to do so, about this first telephone conversation?

The examination of the witness Lewis Cass Ledyard was then suspended for the time being.

A. MITCHELL PALMER, called as a witness on behalf of the Government, was first duly sworn and testified as follows:

Direct examination by Mr. Marshall:

Q. What is your full name?
A. A. Mitchell Palmer.
Q. And you are a member of the House of Representatives?
A. I am.
Q. From Pennsylvania?
A. Yes, sir.
Q. What district?
A. The Twenty-sixth District of Pennsylvania.
Q. How long have you been a member of the House, representing that district?
A. I am now in my third congress.
Q. Then, you were the Congressman representing that district during February, 1913?
A. I was.
Q. You had presented your credentials and been accepted as a member of the House prior to that time?
A. Yes, sir.
Q. And you had voted and taken part in the deliberations of the body?
A. I had.

Mr. Marshall: I offer in evidence the certificate showing that Mr. Palmer was a member of the House of Representatives at the time mentioned.

The paper was marked in evidence Government's Exhibit No. 1.

26 EXHIBIT 1.

South Trimble, Clerk.

House of Representatives,
Clerk's Office,
Washington, D. C.

Certificate.

To whom it may concern:

I hereby certify that Honorable A. Mitchell Palmer, of the State of Pennsylvania, was a duly qualified member of the Congress of the United States of America, being a member of the House of Representatives of said Congress on the Eighth day of February, 1913, and was such duly qualified member prior to said date, being elected to the sixty-first Congress, December, 1910, and serving up to and including the present time.

In testimony whereof, I have hereunto set my hand as Chief Clerk of the House of Representatives, and affixed the seal of said House of Representatives, at the City of Washington, on this the 13th day of November, 1914.

[SEAL.] J. C. YOUTH,
Chief Clerk of the House of Representatives of the United States of America.

Q. Well, now, there were some conversations that we are going to have testimony here about, in which Mr. Ledyard was called up on the telephone, and the person at the other end said he was A. Mitchell Palmer. Was that you that was talking?

27 Mr. Davis: We will admit it was not Mr. Palmer. We will concede that, with respect to these conversations upon which this prosecution is based, the man at the other end of the telephone, who said he was Mr. Palmer, was not Mr. Palmer.

The Court: Very well.

Mr. Marshall: Well, that is all right. We have the concession.

LEWIS CASS LEDYARD resumed.

Direct examination by Mr. Marshall continued:

Q. At the time of the adjournment, I had asked you to tell us the first of this series of telephone conversations that you had with a person who gave the name of Congressman Palmer. Will you please begin and tell us the first one, when it occurred, and all about it?

A. The first of those conversations occurred on the fourth of February, 1913. I was in my office at the time, and my Secretary came to me and said I was wanted at the phone, by Mr. P. I said, "Who is Mr. P.," and then she went off, and she came back and said, "It is Congressman P." "Well," I said, "put him on." I then took up the telephone extension which was on my desk, and there was a voice at the other end of the telephone, said, "This is Congressman P. Do you know who I am," and he—I will just use my memorandum, if counsel do not object.

Mr. Marshall: You may do so.

A. (Continuing:) Because it will be more accurate than my memory. On the fourth of February, 1913, I was called on the telephone by Congressman P., who asked me if I knew who he was from that description.

28 Q. That is the description of "Congressman P."?

A. Yes, sir, "this is Congressman P. Do you know who I am from that description," and upon my replying in the negative, he said, "If I add that I represent one of the eastern districts in Pennsylvania, will that help you?" I said, "No; that does not help me." He said, "Then I will give you my name," spelling it P-a-l-m-e-r, and he added, "the middle name commences with M." He said, "Are you able to identify me now?" I said, "Yes, sir, I am." He said, "I understand that you have been made fully

acquainted with existing plans affecting your people." I told him I did not know to what he referred. He said he referred to the Steel Corporation. I told him I did not represent the Steel Corporation. He replied that he understood that I had had a conference with a gentleman at which the policy of the Democratic party in the coming Congress as affecting that company had been disclosed to me. I told him I had had no such conference. He said he referred to the conference which I had had with a gentleman named "C." I asked him what the initial of this gentleman's first name was, and he said, "J." I told him I had had no such conference. He expressed himself as greatly surprised, as he was informed that such a conference had been had, and in the course of it matters had been fully laid before me. I told him the only thing I knew about any such matter was that a gentleman had told me that Mr. C. would wish to see me and had appointed a time, that I was quite sure from what this gentleman said that he had no idea that the subject of the proposed conference was the Steel Corporation. I told him I knew Mr. C. very well, as he was a classmate of mine, and that Mr. C. had telephoned me that he could not keep the appointment
29 because he was not well, and I had then called him up at his country place and told him I would be away for several days, and he said that the matter would keep perfectly well, until I returned; that I then went away accordingly, but on my return I heard nothing from him, and a few days afterwards the gentleman who had originally spoken to me about C. said that he had been informed that Mr. C. would call me up and make a new date for a conference, but that I had never again heard anything from Mr. C. and that this had occurred two or three weeks ago. And Mr. P. again expressed himself as greatly surprised.

Q. That is the person at the telephone?

A. Mr. P., the person at the telephone, expressed himself as very greatly surprised that I had not had this conference; he supposed I had with C. He then spoke of the policy of the Democratic Party in the new Government. He regretted that the attitude of people interested had been so uncompromising and defiant in relation to the two investigations which have already been had, and he referred to the Stanley Committee and the Pujo Committee. I asked him what he meant. He said that Mr. Morgan had refused to consider any suggestions that the money trust investigation be arrested; and, in reply to authorized representatives of the congressional majority, had said he did not care anything about the matter; that he was not interested and did not care how far the investigation proceeded. As to the Stanley Committee, he said that both Gary and Perkins had openly said they did not mind the investigation, did not object to it; that it could not do the Steel Company any harm. I then said to him: "How do you know that Mr. Morgan took this attitude?" And he said that he knew perfectly well. I
30 said: "You were not present when he gave expression to these opinions—did not hear them yourself?" He said, "No;" but that it was reported to him upon good authority. I said: "You cannot be too sure of these things.

You commenced this interview quite confident that I had had a conference with C., but find that I had not. You may be equally in error about Mr. Morgan's attitude." He said, "I would not be likely to have erroneous information from the Speaker himself." I said: "Did the Speaker inform you that that was Mr. Morgan's attitude?" He said he did. I said, "I think that you should be very sure that that is true before you act upon it. It is not at all consistent with what I know of the facts." He said: "I am greatly concerned at the doubt which you throw upon this, and I want to say to you now that the situation which has resulted from the attacks upon the Morgan interests has come from the clearly entertained belief on the part of the controlling parties of the Democratic Party in this attitude of defiance toward the Government, and if that impression has been erroneously entertained, the sooner we find out the better."

He added that he regarded the present conditions in respect to the Steel Corporation as critical. A new administration was coming into power, and it must speedily determine its policy concerning such matters as the Steel Co., and this with a view to both features of the Anti-Trust act, the civil and the other, and that this policy, and whatever policy should be adopted in reference to the Steel Corporation, would be indicative of the general policy of the Democratic Party in regard to all such matters. And he said that by the Democratic Party he meant both the administration and the congressional majority. He said that he was very anxious him-
31 self that the party should adopt a sane and wise policy which would not injuriously affect the prosperity of the country, but it was hopeless to think that such a policy could be adopted and effectively carried out without the cordial co-operation of the interests affected. I told him I did not doubt that those interests would be glad to co-operate in the establishment and carrying out of such a policy. He then said that before going any further with me what I had said to him about the possibility of his being mistaken in the attitude of the gentlemen concerned had caused him so much disquiet and anxiety that he must make certain inquiries before pursuing any of these subjects with me. He then said I would hear from him again.

Q. And that was the termination of this interview?

A. That was the termination of this telephone interview, this telephone conversation.

Mr. Marshall: Now, it is part of the stipulation that the person who was talking with Mr. Ledyard during that interview, which has just been described, is not the real Congressman Palmer?

Mr. Davis: Correct.

Q. And what was the next one?

A. The following day, February 5th, the record which I made is as follows: "P. again called me on the telephone today, and I had quite a long talk with him." He referred to our conversation of yesterday and said, "Did I understand you to say that you did not represent the Steel Company?" I said, "I do not represent them."

He said, "Do you represent Mr. Morgan?" I said, "I do not, except that he is a very intimate friend of mine." He said, "You know him very well?" I said, "Very well, indeed." He said, "Do you have his confidence?" I said, "I think I have, quite fully."
32 He said, "Through him, or otherwise, are you not in touch and in confidential relations with the controlling interests in the Steel Corporation?" I said, "I think I possess their confidence, and with some of them my personal relations are very close."

Then he said that that being so, he wanted to inform me that he had been very much disturbed about what I said yesterday about his being mistaken in relation to the defiant attitude of Mr. Morgan and others, and particularly Mr. Morgan. He said that it was not until the exhibition of this defiance that the Untermyer plan for the Money Trust investigation was approved by the controlling interests in the Democratic majority in Congress; but as I had now thrown a doubt in his mind as to whether or not they were right in attributing that attitude to Mr. Morgan, they were very anxious that this doubt should be cleared up—that the speaker himself had been very much surprised and disturbed at P.'s report. He said "that I had thrown a doubt on the accuracy of their information and that he was now prepared to state to me through whom the reports to the speaker had been made. He said that Edward Lauterbach was the man who had reported these matters to the Speaker, and that he now wished me to put myself in communication with Mr. Lauterbach, to send for him or to see him and to thrash the matter out with him, and to ascertain what the actual facts were, and that after I had had such an interview with Mr. Lauterbach he, P., would take occasion to communicate with me again.

I said to him that when he mentioned the name of Lauterbach it opened a good deal to my view. I said to him, "Do you not know who was supposed to be behind Lauterbach and the private interests that he was understood to represent? Did you not
33 know that there was an individual whose character was well known in this community who was supposed to have instigated the Stanley investigation and who was supposed to be in close relations with Lauterbach and that the latter was his counsel and represented him?" He said he did understand these things. "Well," I said, "That being so, you must not be surprised if these gentlemen being approached by Mr. Lauterbach gave no credit to anything that he said." I said, "Mr. Lauterbach himself does not enjoy a reputation for trustworthiness in this community. I did know that he saw one or more members of J. P. Morgan & Co., and that he undertook to tell them that he could arrest the Stanley investigation, or that he could fix it, or that he could arrange it, but, I said, "I am quite sure that these gentlemen never dreamed that he represented anybody but himself and the selfish and ulterior purposes of his client." He said, "You mean a man whose initials are D. L.?" and I said, "Yes; I do." I said I was informed of these attempts by Mr. Lauterbach to get into communication with the firm. I do not now remember whether he stated to them that he

came by authority of the Speaker of the House. I do not think he did, for that would have made an impression upon them.

As I remembered what was stated to me at the time, it was simply that he, "L.," could arrange the matter if they desired him to, and they never dreamed that that meant anything except Lauterbach and Lam[illegible] and the payment of money, or in some other way taking care of them, and that they never intended to do and never would do. He said, "Did Lauterbach demand money?" I said, "I do not know whether he did or not. People generally do not demand money when they go on such errands."

34 He said, "I want you to know that Mr. Lauterbach went there by the explicit authority and direction of the Speaker himself," and that in going there the Speaker said to him, "If anything is said to you about money, you tell them that you have nothing further to say. There must be no question of money in this thing. I want to know just what their attitude is." That Lauterbach returned with the report that he had executed the commission intrusted to him, and that they were perfectly defiant. Lauterbach was intrusted with this commission because he said that he had intimate relations with Mr. Morgan, and he had his confidence, and had represented Mr. Morgan in various matters. I said, "I do not remember Lauterbach's ever representing Mr. Morgan in anything, except, I think, I have heard of one transaction in which Mr. Morgan was interested, and in which Lauterbach, by reason of his being already associated with the transaction, was found useful. I do not remember now what it was, but I think there was an instance of that sort which I recall vaguely." He said, "It is most important that this question of veracity be cleared up." I said, "Do you wish me first to see the partner in J. P. Morgan & Company, who had the talk or talks with Mr. Lauterbach?" "No," he said: "I would rather you would see Lauterbach first and make him tell you his complete story and get out of him all that you can about the facts, and then you may make, having received his story, such investigation of it as you see fit; and I want to say to you that the report which shall be made to the Speaker of the facts will be a report of the facts as you state them. Your statement of the facts upon such investigation as you will make will be taken as establishing the facts, and this is of the

35 utmost importance because I consider the position today very threatening. Things are in contemplation in relation to the Steel Company which are most grave, and they are based upon this assumed defiance of the Government by these interests." He said, "If your impressions of the situation are correct, it is manifest that a great error has been made, and that the whole power of the majority of the Democratic party in Congress and its leaders have been used to attack and injure these interests with which you are friendly, most unjustly, and in the entirely mistaken belief that they were indifferent and were practically defying the Government to do its worst." The next day——

Q. Is that the next day after the telephone conversation?

A. This came after the second telephone conversation.

Mr. Marshall: And I am correct in assuming on the record that

our stipulation covers the fact that the conversation with Mr. Ledyard at this time was with the person who was not the real Congressman Palmer?

Mr. Davis: Correct, yes, sir.

Q. What happened the next day?

The Court: That would be the sixth?

Mr. Marshall: The sixth.

Q. You did have an interview with Mr. Lauterbach?

A. I did, I had an interview with him on the afternoon of February sixth, 1913, at my office, with Mr. Lauterbach.

Q. And now, I will not ask what occurred at that interview, at the present time, but on the seventh, in the afternoon, were you called up again by the supposed Congressman Palmer?

A. I was.

Q. Tell us about that interview, and how that occurred?

36 A. February 7, 1913, I came to the office a little after three o'clock and was informed that the person calling himself "Congressman P."—I am taking my record as written, so much of it as is under date of February 7, 1913, as applies to the information that Mr.—the mysterious Congressman P.,——

Q. You were called up by the supposed Congressman about twenty minutes to four?

A. I was.

Q. And you were then at your office?

A. Yes, sir, and not alone.

Q. Tell us what occurred,—what did he say?

A. He asked me if I had had the interview. I said I had, and he asked me with what results. I told him the results were not to confirm the impression he had had about Lauterbach; that I had sent for Mr. Lauterbach and had a long interview with him; that he had professed to tell me the whole story as far as he was concerned, and that he had said to me that he had gone to the Morgan people originally, giving them no reason to suppose that he had any connection with the matter except through Lamar, and that naturally those people had felt that he was tied up with Lamar and had not responded to any advances. P. asked me,

Q. (Interrupting:) That is the one that telephoned to you?

A. Yes, sir, Congressman P. asked me if Lauterbach had not represented to the Morgan people that he had gone with authority from the people in Washington. I said I had asked that question distinctly of Lauterbach, and he had replied that he had not made any such representations and that he also declared in the broadest possible way that he had not, directly or indirectly, by writing, telephone, telegraph, or other means, or through any intermediary or instrumentality, made any report to anybody so that it might reach or be intended to reach Speaker Clark concerning any interviews

37 he had had with J. P. Morgan & Co., or their attitude in relation to what he had to say.

Palmer stated that he was very much surprised. He also said that this was the crux of the matter: that is, the determination as to whether Lauterbach had performed his mission. I also told him that

Lauterbach stated to me that he had never received any instructions from nor made any report to the Speaker; that he had never seen the Speaker but once in his life, and then not upon this subject. He,—that is, Palmer,—then said the instructions to Lauterbach were not given by the Speaker in person. The Speaker used Senator Stone as his instrument, and Senator Stone was to employ Lauterbach. But, I said, "You told me before that Lauterbach was a person who possessed the Speaker's entire confidence, and that he had employed him." He said, "Yes, he enjoyed his confidence, but the communications were not made by the Speaker directly, but through Senator Stone." He then asked me if I had seen "your people,"——

Q. That is, your people?

A. I put that in quotations, "your people," about this matter. I did that to make it clear, he asked me had I seen my people about the matter, that is what that means. I said I had spoken to them shortly about it and that they rather confirmed my impression. They said to me that Mr. Lauterbach had come to them, and had mentioned Lamar; that he had not made any representations that he represented or had any authority from any person in Washington, either Speaker Clark or anyone else, "or yourself, Mr. Palmer," or anyone else in Washington. He said, "Well, would your people be disposed to deal with him now? Is there any objection on the part of your people to dealing with him? Is there any change in their attitude about that?" I said, "I do not know; I have not
38 asked them. And naturally they could not respond to them under the circumstances under which he went to them." He answered, "Quite naturally." I said, "I do not like to talk about this, with names and all, over the telephone, and I think it would be very much more satisfactory if I could see you; and I would be glad to make an appointment for you to see me here this afternoon, and I will tell you the whole of my interview with Lauterbach." He made no direct reply to this, but said that he wanted to know whether my people were in a frame of mind to co-operate with the Democratic organization. I said, "You mean the Democratic organization in Washington?" He said, "Yes." I again suggested to him that it would be better for him to see me, and expressed my willingness to see him at any time, preferably this afternoon. He said, "Well, I must have a conference first; this matter must be reported. I shall have a conference first before I see you, a conference with Senator Stone, the Speaker and Mr. Henry, and we will talk it over. Then I will communicate with you further." I said, "I am going away next Wednesday or Thursday, and I may be gone a week or more. I may go South." "Well," he said, "I will see you before that." I said, "Suppose anything should develop here in the interim. Is there any way in which you would like me to communicate with you?" He hesitated a minute, and then said, "Well, I shall be in Bethlehem on Sunday, and I may call you up there. Will you be at your house?" I said, "I may, probably, but I do not know. I cannot answer for Sunday."

By Mr. Davis:

Q. Meaning that he would call you up there?

A. He would call me up from there. He did not mean to
39 call me up there. *He* said, "I may, probably, but I do not know. I cannot answer for Sunday." "Very well," he said, "if I call it will be early in the morning, before church, for I shall go to church. I always do. It has been a practice of my life to go to church Sunday morning, and Sunday afternoon and to prayer meeting on Wednesday evening, and I am the better for it." "Well," I said, "I have not kept up that practice myself." "Well," he said, "one is better for it." He said, "I will call you up." I said, "After the conference." "Well, we must have a conference at once," he said, "and it will be with Senator Stone, who employed Lauterbach and to whom he made his reports, and the Speaker, Mr. Henry, and myself——"

Q. One moment; do you happen to know that the real Mr. Palmer is a devout Quaker?

A. I do now, he is a well-known Quaker.

Q. That was the end of that conversation?

A. Yes, sir.

Mr. Marshall: Now, to keep our record clear, I suppose it will be conceded that the person talking with Mr. Ledyard in this last conversation was not the real A. Mitchell Palmer?

Mr. Davis: Correct.

Q. Now, on February 8, in the morning, did you or were you called again by this Mr. P.?

A. On the morning of February 8 I was at my house, in my library.

Q. Now, did you get in touch with, or have a telephone talk with this same Congressman P., when you had been called to the telephone?

A. I had a telephone talk with that same voice, speaking over the telephone.

Q. By the way, Mr. Ledyard, was there anything distinctive about this voice?

A. Quite so.

40 Q. And was it always the same voice, in all these conversations you had with him?

A. Always the same voice, and always a very marked voice, an intonation. It was a voice that was very much ore rotundo, the voice of an orator.

Q. He spoke in an oratorical way?

A. Yes, sir, he would say, "Mr. Ledyard, is that you this morning?" "Yes, sir." "And how are you this morning, sir?" It was all of that type, of that tone of voice. I am not a very good mimic, but it belonged to that class.

Q. Now, let us get your conversation.

A. You wish that conversation?

Q. Yes, the conversation of that morning of the seventh.

The Court: It is the eighth.

A. Yes, Saturday morning, the eighth. It was the same voice I

had heard on several occasions; as I said this was Saturday the eighth, the morning of Saturday, the eighth of February, 1913, and it was at my house in 72nd Street, the same voice which I had heard on several occasions when Mr. P. spoke to me. "Is that Mr. Ledyard?" And I said, "Yes." He said, "Have you heard anything new?" I said, "Are you Mr. Mitchell Palmer?" He said, "Yes." I then said, "I have heard nothing new." He said, "Well, I want to inform you that we have had a conference. We have decided that it would not be wise for us to discard the services of that gentleman who has been heretofore employed." I said, "Do you mena Mr. Lauterbach?" He said, "Yes." Then he said, "I must inform you, Mr. Ledyard, that we have decided that his services must be retained. It would not do to discard or repudiate him now. That would alienate
from us, perhaps, and from the plans which we have under
41 consideration the very necessary co-operation of a gentleman
who will assume a very important position in the coming administration. I refer to the Judicial Department." I said, "Do you mean the Attorney General?" He said, "Yes." I said, "But I have heard that you were to occupy that position, Mr. Palmer." "Oh, no," he said, "nothing would induce me to accept that position. I shall not be Attorney General." I said, "Will it be an eastern man?" He said, "No; not an eastern man." I said, "Then it will not be Louis?" "Oh, no," he said, "you will find the Cabinet will be a strong one and will not be made up of men of his caliber." I said, "Then I suppose it will be some one from the West?" "No," he said, "not from the West, but the gentleman who will occupy that position will be a radical. Now," he said, "we have concluded to ask you to see Lauterbach again. He will have full instructions to lay before you the plans which are under consideration and will inform you fully of the situation." I said, "Do you mean for me to send for Mr. Lauterbach again?" He said, "Yes." I said, "How can I do that when he has already been to me and has professed to disclose all that he has to say and all that he knows? Do you wish me to inform him that I have had these conversations with you?" "Oh, no," he said, "not a word about me."

"Well," I said, "in my former conversation with Mr. Lauterbach he professed not to have received any communications from any people in the Democratic organization. How can I now ask him what their plans are? Do you mean that he has not been frank, as he said he was—that he has lied or misrepresented the facts to me?"

"Well, Mr. Ledyard," he said, "You may not know that
42 I am a Quaker. The doctrines of that persuation forbid us
to say evil of others, and therefore I must leave your question unanswered." "Well," I said "How will Mr. Lauterbach know what to say to me if I see him?" He said, "He will have received his full instructions, and I hope you will call soon for him, if possible today—perhaps this morning—and then when you have heard what he has to say, and perhaps will have communicated it to your people, and you will see what the situation is, then later I may arrange for some of us to see you directly, perhaps one or two of us,

possibly including myself." "Well," I said, "I think it is a good deal better for me to see you now, so that you may tell me directly what there is to say."

He said, "No, we have decided on account of the gentleman I have spoken of, who is to occupy a high official position, that it had best be done in the way I am suggesting. I want, however, to make this one qualification—that if in your interview there is any mention of money, of course you must know my reputation well enough to know that there is no question of money involved in this matter. The only object I have, and those who are prominent in these matters with me and in the councils of the party, is the good of the country and the preservation of interests which ought to be preserved and the prosperity and success of the Democratic party.

"Now, if in speaking to you this gentleman ever approaches or alludes to the subject of money, of course I should expect to have you break off the conversation, for I wish you to know that if any suggestion of that sort is made, it is without authority, and does not come from us."

I said, "Am I to understand you to mean that if Mr. Lauterbach suggests that any money is to be paid or thing of value, I
43 am to regard it as a personal speculation of his own, and in violation of his instructions and a betrayal of his position?" "That is just what I mean," he said. I said, "You need not have any anxiety about how I should receive any suggestion of money from him or anyone else." He said, "After you have had this conversation with him I will communicate with you again." I said, "Very well."

In this conversation P. also said, "There is tonight a most important conference in Washington, having to do with the threatened plans of which I have spoken to you. It may have momentous results, but perhaps will not be final, but in perhaps four or five days from now the time will come when the final decision about these things must be taken, and that decision is one which will affect in a most serious way not only the Steel Company, but its Directors. If steps are to be taken to guard against these consequences they should be promptly taken."

That closes that telephone conversation of the eighth, of the morning of the eighth.

Q. Now, in the afternoon of the eighth, did you call Mr. Lauterbach and ask him would he see you?

A. I did.

Q. And did he come?

A. Yes, sir.

Mr. Marshall: Just before we pass that by, it is conceded that the person having this telephone conversation on the morning of February 8th, 1913, was not the real Congressman Palmer?

Mr. Davis: That is correct.

Q. Now, what did Mr. Lauterbach say when he came on the eighth of February, 1913?

Mr. Davis: Now, if your Honor will be good enough to run the matter over.

44 Statement examined by the Court.

Mr. Davis: Now, may it please your Honor, I make in addition, to the objection already presented to the Court, an additional objection. I assume from my knowledge of this case that no effort will be made on the part of the Government to prove any other alleged impersonation of Congressman Palmer, than has already been retailed by this witness. Now, very obviously, dealing with the first objection first, there is a vast deal in what Mr. Ledyard is prepared to say about his interview with Mr. Lauterbach that exceeds the compass of any commission as to what had passed between him and the fictitious Mr. Palmer, that had been committed to him. Moreover, and this it seems to me is vital and fatal at this juncture. It is my contention that in order to have a conviction under this indictment the testimony must clearly show that in the alleged impersonation, or following the alleged impersonation, and that in consequence thereof, the defendant must have taken it upon himself to act as the officer whom he is charged with having impersonated.

The Court (after argument): The objection will be overruled.

Mr. Davis: Does your ruling extend to all of the interview?

The Court: Yes, it seems to me it is broad enough to cover that case.

Mr. Davis: Well, in order to have the record straight, objection is made to the introduction of this testimony upon three separate and distinct grounds, first, that it is incompetent upon the

45 ground already argued, and second it is irrelevant upon the ground already argued, and third that it is immaterial upon the ground already argued, and to your Honor's ruling overruling the objection, and permitting the witness to answer, we respectfully take an exception.

The Court: The exception will be noted.

By Mr. Marshall:

Q. Now, in order to bring back the continuity of your testimony, let us go back and review it to this extent, that this person who was talking with you on the telephone on the morning of Saturday, February 8th, told you to call up Lauterbach, that Lauterbach would call with full instructions, and so forth. Now, did Mr. Lauterbach come to see you on the 8th of February?

A. Yes, sir.

Q. And what happened?

Mr. Davis: To avoid the consumption of time, if your Honor please, and also to avoid trespassing too much upon the consideration of the Court, may it be understood that this objection is taken to each and every of the matters about to be related by the witness in answer to this question? Will your Honor permit the objection on the record to stand, as though the objection were made and a ruling made and an exception noted to the several branches of the interview, so that I will not trespass on the Court's attention?

Mr. Marshall: I think that has already been done.

The Court: I think so. Of course, I examined this very hastily, I may have overlooked something, and I would dislike very much to make a blanket ruling that might be wrong. Of course,
46 you understand, my examination has necessarily been very hasty, and there may be something here which should not come in, which I am mistaken about.

Mr. Davis: Well, I did not want to interrupt the witness unduly.

Mr. Marshall: I am entirely willing to take the chances of a blanket ruling on this. I am sure that every word of it is entirely material to complete the continuity.

The Court: I will permit the testimony at this time, and will permit an exception that will be broad enough to cover any part of it, and I can follow the witness, and if anything has escaped my attention, perhaps I can see it.

A. I ought to have answered the question, that it was on the eighth of February, following the telephone talk which I have last given, with the alleged Congressman P. I called up Mr. Lauterbach, got in communication with him, and—am I to give that conversation?

Q. And he came to your house?

A. Yes, sir, he came to my house pursuant to that conversation over the telephone.

Q. Did he ask you what you wanted him for or why you wanted him, or anything of that sort?

A. No. I called his office about two o'clock, and they said that he was not in, but that they could reach him on the telephone. I finally got him on the telephone and he said, "Is that you, Mr. Ledyard," and I said, "Yes, how are you?" And he said, "I am uptown at the Turkish bath, I am in bad shape, trying to get rid of a stiff knee and a bad leg." I said, "I have been told you wanted to see me," and he said, "Very well, I will be very glad to
47 see you. Where can I see you?" I said, "I can see you this afternoon." He said, "Where are you?" and I said, "I am in my office." He said, "Where can you see me this afternoon?" I said, "I can see you in my office this afternoon." And he said, "I expect to be up here at this Turkish bath for the next two days and can't see you before that. I am afraid I am in rather a bad shape, and could not get downtown. Can't I see you somewhere uptown; how about the New York Yacht Club?" "Well," I said "do you belong to the New York Yacht Club?" and he said, "No, but I know that you do." "Well," I said, "There is no spot in that place to talk to you," and he said, "Will you be uptown after five o'clock?" and I said, "Yes," and we agreed to meet at my house, and I said, "You know it is 125 East 72nd Street," and he said, Yes, I will be there at five o'clock." He came to my house, pursuant to the appointment so made, and I saw him in my library. The record that I dictated of the conversation is as follows: I stated to him, "I understand that you wish to see me again, and have

something to say to me." He replied that he did, but he wished to preface what he had to say with a personal statement.

Mr. Davis: Now, if your Honor please, I object.

Mr. Marshall: I really object to the interruption. We have a blanket objection, overruling and exception made three times.

The Court: The objection made is considered as made to each paragraph and each part and every part of this testimony, and it will be overruled and an exception noted, without repeating
48 the objection, and if there is anything in there which is wrong, as I follow it along, I will say so.

The Witness (continuing): He repiled that he did, but that he wished to preface what he had to say with a personal statement. He said he felt very keenly the position in which he had been placed, that going to Mr. Morgan and his partners as he did he felt that they had repelled his advances, and that, as it were, a stone wall arose between them, and that his motives and purposes in going to them had been viewed by them with suspicion and distrust.

"Well," I said, "don't you think that was natural when you recall the circumstances under which you went to them?" He said, "Yes, I think it was natural that it should be so."

I asked him if he did not feel confident that they felt that he was mixed up with and represented Lamar, and he said, "Yes, of course they did." "But," he said, "on the later occasion, when I went to Mr. Steele, they ought not to have felt that way, because then I told them I felt that I could control the matter without doing it through Lamar."

But I called his attention to the fact that he had already informed me that when he went to them in the second stage of his approaches he did not inform them that he represented anybody.

"Well," he said, "as a matter of fact, Mr. Ledyard, the intermediary was Senator Stone." I said, "What intermediary do you mean?" "Well," he said, "When I went to them in the second stage that you refer to it was after I had been authorized to do so by Senator Stone." "But," I replied, "you did not inform them of that." "No," he said, "perhaps I was over prudent and very
49 cautious At all events, however it may be, I feel very keenly the position in which I have been placed in all this matter, and I am extremely anxious to be put straight in it, and I would be very glad to feel that you, Mr. Ledyard, could say since you have heard me that you do not think I was engaged in anything improper."

To this I made no reply.

As he resumed, "I went to them because of my regard for Mr. Morgan. He had done kind things for me, as he does for others, and I had no purpose or intention at any time except to be of service to him. And now I want to be able to vindicate myself and my character."

"Well, Mr. Lauterbach," I said, "you seem to have gone to them

pretty completely enveloped in the atmosphere of Lamar, don't you think?"

He said, "Yes, I did; but that is what I want now to correct." I said: "I suppose you mean that you want to be 'un-Lamared.'" He said, "Yes, that is precisely it."

"Well," I said, "I will hear anything that you want to say to me." He then said: "I come here now authorized and empowered to make certain statements to you and to lay certain matters before you."

I said: "One moment. When you came to see me a few days ago you said you did not know that you were to see me or that I was going to send for you." I referred then to the first interview I had had with him at my office. I said: "I huppose from what you say that that is not true of the present occasion."

"No," he said, "this time I have received instructions to see you."

50 I said, "Do you know that within the last few days I have had some conversations on the telephone with a gentleman"——

Here he broke in and said: "A gentleman whose name we need not mention."

"Very well," I said, "if you wish it so—a gentleman whose name we will not mention, but of whom it may be said,"—then I paused, and he continued the sentence—"of whom it may be said that he is a gentleman occupying a very prominent position, and whose name, Mr. Ledyard, would convey to you every conviction of confidence, is that not so?"

I said: "Yes; and one whose name would inspire trust in anyone."

"Well," he said, "I know that you have had those telephone conversations."

"Well," I said, "proceed."

And then he resumed his statement substantially as follows:

"Of course the most important office, in the view of many of us, to be filled in the coming administration is that of the Attorney General. Until recently it was supposed that Mr. Palmer would be the Attorney General, but I am now informed that this is not likely, and that the Attorney General will be from the South. I may say, under my breath, that it will be Mr. Henry. But whoever is chosen, it will be a man who can be controlled, and will be controlled by the Speaker. Now, there are several things that the radicals in Congress may attempt, and unless controlled may succeed in carrying through.

"First, the obtaining of control of the property of the subsidiaries of the Steel Company through receiverships.

51 "Second. Criminal proceedings against Directors.

"Third. Obstructions to any dissolution plan, if one should be desired. Of course I do not know whether the Steel Company would desire to agree with the Government upon some fair and reasonable plan of dissolution, but if they should no doubt that could be brought about; but the radicals might attempt to obstruct such a plan. I am instructed to say with authority that all the aforesaid

matters can be controlled, but there are certain stipulations and conditions accompanying this suggestion, which I now propose to state."

Here I broke in and said, "Mr. Lauterbach, you seem to be stating these things not in mere general terms, but with a good deal of particularity and preciseness. Am I to understand that you are doing that with a purpose?"

He said "Yes; I am adhering very closely to the instructions of the authority which I have received."

"Then," I said, "if there is more of this to come, I think it would be best, since I am not very familiar with these matters, for me to get a piece of paper and as you go along make a memorandum of the things you say, so that I shall omit none of them, and so that they shall be clearly understood."

He said, "I think that would be an excellent idea."

I then got a pad of paper and a pencil and in his presence made notes of what he had to say. These notes are somewhat more concise than the statements which he made as we went along in the interview. He would take up a point and state it, and when he had finished with it I would write down its substance, reading aloud as I wrote, and in many instances he would break in and dictate the point, and
52 I wrote it from his dictation. I append to this statment a copy of the memorandum thus prepared in his presence.

When he had finished I read this memorandum aloud to him and asked him as I passed each successive point whether it correctly expressed what he meant to say, and he said it was correct.

After stating the three things above enumerated which the radicals might attempt to do, and which could be controlled, he said there were, however, certain conditions and stipulations attaching to the exercise of such control. He said it was desired by those whom he represented that he, Mr. Lauterbach, should be the conduit or intermediary or instrumentality through which the desired results might be brought about. He said that he himself was anxious that he should be retained or employed in that way by the Morgan and Steel people, as that would be, to some extent at least, a vindication or rehabilitation of him and would tend to show that the erroneous impression which had been entertained concerning the unworthiness of his motives and the impropriety of his conduct had been dispelled. He would like to receive for such services a reasonable fee. He would be glad to have such a fee arranged for, but that this would not be a condition. Those whom he represented did not make it a condition nor did he himself, for if it were found impracticable or undesirable, or if the Steel people were unwilling that he should be employed in that way or on their behalf, then he would be willing to co-operate cordially without receiving any fee.

The next thing which those whom he represented insisted upon as a condition of bringing about what they proposed was that no money should be paid to any person whatever for any legislative or
53 other purpose, with the possible exception of the suggested fee to Lauterbach above mentioned.

Next—and this, he said, was insisted upon absolutely—that the parties whom he represented required that if any pledges had been

given to Roosevelt or the Progressive Party by the Morgan or Steel interests such pledges are to be stated to those whom Mr. Lauterbach represents and, if possible, gotten out of the way. He said that those whom he represented could not ask anyone to break or repudiate any such pledges; but if any such still exist they must be stated and, if possible, compromised, arranged, or gotten out of the way in some manner.

The next condition is that no campaign contributions shall be made to either party, either to the Democrats, the Republicans, or the Progressive Party.

Next, the aid of the Morgan and Steel people may be invoked to secure the support of certain southern Senators, who will be named to them, for measures which will be adopted by the Democratic Party, either in conference or caucus, so far as they affect the following matters: First, the tariff; second, taxation; third, universal peace, or, rather, he said that expression is somewhat inadequate; I mean matters affecting international peace. He added that this third feature was included because it was a matter very dear to the heart of William J. Bryan. He went on to explain what he meant by the securing of the support of certain southern Senators for those measures. He said, "The names of the gentlemen who are referred to here will be furnished later; but to illustrate what I mean by this provision let me say that there might be a case like Bailey, of Texas, who would refuse to join or be bound by the party policy on such matters.
54 What we want is that so far as possible in any such case Morgan and steel people might use every influence to bring them into line."

I interrupted him here to say that I knew very little about these matters, but I observed that the first class of legislation referred to was the tariff. "Now," I said, "your suggestion, according to what you say, is intended to be laid before the Steel people. I do not know to what extent they are affected by the tariff, but suppose the Democratic Party should propose absolute free trade in all steel products, would you expect them to commit themselves in advance blindly to support any such policy as the party might adopt? Your next instance is that of taxation. What does that cover?" "Well," he said, "that covers internal-revenue taxation." I said, "Including the income tax?" He said, "Yes; including the income tax." "Well," I said, "suppose the party should commit itself to some very radical and unfair scheme of progressive income taxation. The suggestions which you are making to me today are made for the purpose of having me transmit them, if I decide to do so, to men who are supposed to be men of wealth. Do you expect them to voluntarily commit themselves to maintain any scheme of progressive income tax, however unjust? Suppose, for instance, to take an extreme view, a tax upon a progressive basis should be advocated by the party under which the Government should take 50 per cent. of any income exceeding $100,000. Would you expect them to commit themselves to that and support it?" "No," he said, "I would not, nor to the illustration that you have suggested about the tariff. On my way up here I was thinking about these matters, and it occurred

to me that some modification of this suggestion ought to be
55 made. Manifestly we could not ask any of these gentlemen to commit themselves in advance or in any other way to that which would be unjust or which would be of material injury to them; but I have not discussed any such modifications with the people whom I represent, and therefore I am not able to go into further particulars about that. I want to add," he said, "that the desire which leads to our suggestion as to procuring co-operation for these subjects of legislation is that there should be a unified Democratic Party, which would stand together for the legislation which those whom I represent consider desirable." Here he stopped, and I asked him if that was all, and he said, "Yes."

Then I said, "Mr. Lauterbach, upon your own statements to me you have already, on certain occasions, approached Mr. Morgan or members of his firm with offers on your part to stop, or arrest, these investigations. You say to me that they repelled your advances, and treated you with great coldness, and you say also that you think that was because they associated you with Lamar, and that you meant, to them, Lamar, and that you were approaching them enveloped in an atmosphere of Lamar, and now you come to me and ask me to transmit your present suggestions to those same gentlemen, and you say that you are fully empowered and authorized to make them by certain people whom you represent, but you do not tell me who those people are. How can you expect any different reception to be accorded to your present advances than that which your former ones received? Do you not think you should tell me from whom you come, and whom you represent?" "Yes," he said, "I think I should, and I will. I come here by authority of Speaker Clark, and I have made all these suggestions by his authority." I said, "Have you
56 seen Speaker Clark yourself, personally?" "No," he said, "I have not." Well," I said, "how do you know that you come here by his authority?" He said, "I have received my instructions to come and see you and lay these matters before you directly—from Senator Stone, acting on behalf of Speaker Clark." I said, "Have you seen Senator Stone yourself, personally, and received these instructions and this authority from him?" He said, "I have." I said, "Did he say that he represented and acted on behalf of Speaker Clark?" He said, "Yes; he did." "Well," I said, "how do you know that he did, otherwise?" He said, "Well, there have been a number of occasions before when Senator Stone has spoken to me on behalf of Speaker Clark, and I have found afterwards that his assumption of representing him was fully justified. An instance of it occurred only the other day in relation to the examination, before the Pujo Committee, of Mr. Rockefeller. I was able to arrange that matter through Senator Stone, acting through Speaker Clark. I succeeded in arranging in that way his examination taking place at Jekyl Island, instead of having him brought to Washington. Senator Stone assured me that this should be done, and it was done, and it was done by Speaker Clark."

I said, "Does Speaker Clark know that this interview between you and myself is taking place or that it has been arranged to take

place—this present interview?" He said, "He knows that this or some like interview is arranged for." I said, "Would the Speaker verify that if appealed to for verification?" He said "He would." I said, "If that be so, do you not think it would be only a reasonable precaution for us to take to inquire of the Speaker directly whether what you have done here is by his authority?" "I certainly do," he said, "and I would be glad to have you do so. I would be
57 entirely willing that any of you should go to Speaker Clark and ascertain from him that everything I have said today is with his direct authority." Then he said "One moment. There is only one qualification I would wish to make of that. Since I have not seen the Speaker himself personally, I would like to be advised in advance in case you apply to him for a verification of my statements, so that if there should be any possible weakness which I do not know of in the chain, or if he should be unprepared to receive the person who might be sent to him from you, I might have an opportunity of arranging it."

After he had concluded his statement I read over to him the notes I had taken as above stated, and he pronounced them correct. He did not at any time ask me whether I would or would not communicate any of the foregoing statements made by him to the people to whom he desired them transmitted. He contented himself with saying that he wished them so transmitted, and on each occasion when he said this I made him no reply. When he left I said, "Mr. Lauterbach, I will take time to consider your statement." This interview took place on Saturday afternoon, February 8th, 1913, at five o'clock.

Q. Have you that memorandum with you?

A. I have it here, attached to my record, the pencilled memorandum referred to.

Q. The one you showed to Mr. Lauterbach?

A. The original one which was made by me in pencil, in his presence, in which it is described in the way I have already described, the same day, consisting of three sheets, each of those sheets bearing the endorsement: "Mem. made by me in presence of E. Lauterbach at my house, February 8, 1913. L. C. L." signed by my initials, which I produce.

58 Mr. Marshall: I ask that that paper, that original paper, be received in evidence.

Mr. Davis: With the same objection and the same ruling and exception?

The Court: Yes, sir; it will be received.

The same was marked in evidence Government's Exhibit No. 2 of this date, consisting of three pages.

The Court: I ought to say, is my understanding correct, that your objection does not go to the manner in which this testimony has been given, but to the substance?

Mr. Davis: Oh, yes, that is correct.

Mr. Marshall: Now, I will read this memorandum, Government's Exhibit No. 2 in evidence, which Mr. Ledyard made at the interview with Mr. Lauterbach, I will read it to the jury:

The said memorandum was thereupon read to the jury, as follows:

GOVERNMENT'S EXHIBIT 2.

Memorandum made by me in the presence of E. Lauterbach at my house February 8th, 1913. *L. C. L.*

a. Atty. Gen'l from South in all probability, but whoever he is, will be in sympathy with Clark.

b. Radicals might attempt three things:

1. Control of property of subsidiaries through receiverships.
2. Criminal proceedings agst. directors.
3. Obstruction to any dissolution plan, if one should be desired.

59 All these to be controlled.

c. L. to be conduit, intermediary, etc.

d. No money to anybody for legislation or other purposes, except perhaps reasonable fee to L., but that he does not insist upon, being willing to co-operate without.

e. But parties whom Lauterbach represents require that if any pledges by the Morgan or Steel interests to Roosevelt or the Progressive Party exist, they are to be stated, and if possible gotten out of the way. I don't say broken because I don't want anybody to break pledges.

f. No campaign contributuions to be made to either party, either Dem., Rep. or Prog.

g. The aid of Morgan and Steel people may be invoked to secure the support of certain Southern Senators who will be named, for measures which will be adopted by the Dem. Party either in conference or caucus, so far as they affect the following matters:

1. The Tariff.
2. Taxation.
3. Universal peace—or, rather, matters affecting international peace. B.

I am stating this according to the instructions I have received, but I can well see that those whom I represent could not well insist upon this co-operation as to legislation if the proposed legislation materially affects injuriously their interests, e. g., a progressive income tax or a policy on tariff on steel, etc., products that would be unfair.

Such modifications now occur to me, but I have not discussed them with my friends.

The desire which leads to this suggestion on legislative co-
60 operation is to have a unified party in the Democracy.

Speaker C. knows that some one is to have such an interview as the present, and all that I have said and proposed is subject to a representation by me which I make that the Speaker will on application personally vouch for all that I have said and proposed. I mean that I should, however, be advised in advance of such application, so that if there should be any weakness in the chain I may correct it.

LEWIS CASS LEDYARD, resumed.

Direct examination by Mr. Marshall:

Q. I now ask you to go back, Mr. Ledyard, to February 6th, and the visit which Mr. Lauterbach made to you on that date?

A. Yes, sir.

Q. Will you please state what led to that visit, whether you called Mr. Lauterbach up, or how it came about?

A. (Examining paper.) The conversation of the day before over the telephone with Congressman P., in which he had asked me to put myself in communication with Mr. Lauterbach and send for him and find out what he had to say. Accordingly, the next day, February 6th, following that interview, and in pursuance of that request of Congressman P., I telephoned Mr. Lauterbach at his office, called him on the telephone, and said, "Mr. Lauterbach, I want to see you"—and told him I wanted to see him at my office, and he said he would come right over.

Q. Did he come over?

A. He came over, and I then had——

By Mr. Marshall:

Q. (Interrupting.) Did he ask for any explanation of your request?

61 A. No, sir; that is all that occurred over the telephone.

Q. You said "I want to see you?"

A. "I want to see you at my office right away," and he said, "I will come right away" and came. I am not using the exact language, but that was the substance of it.

Q. Did you give him any reason for calling him?

A. That is all that occurred, not in the exact language, but in substance.

Q. Well, now, when he came there you did have a talk with him?

A. I did.

Q. And you kept notes of that talk which you had?

A. I dictated it, as I did the other interviews, telephonic and otherwise.

Q. Now, just refer to your notes, Mr. Ledyard?

A. Yes, sir.

Q. Tell us the first part of what occurred, down to the what you say the story substantially was, and then stop for a moment.

A. (Referring to memorandum.) I had a long talk with him. I told him I wished him to tell me the whole story of any part he had had in any approaches to J. P. Morgan, or any of the firm, in relation to the Steel investigation, and that I would like him to make the statement full and complete and frank. He said he would. That is all that occurred in that first part, and he at once started to talk, upon that introduction.

Q. Now, what did he say?

Mr. Davis: If your Honor please, it is very evident that the con-

versation about to be narrated was on the invitation of the witness, without any intimation at all to Mr. Lauterbach that it was in pursuance of the suggestion of the fictitious Palmer that this interview should be had, wherefore the relation of the parties now established is such that whatever Mr. Lauterbach might say would
62 have no sort of relation to, or be binding upon, the imaginary party. If the interview had been "and sent for you in pursuance of a telephone message which I received yesterday from a gentleman calling himself Representative Palmer, and I want to talk with you accordingly," that would be one thing, but the witness testifies very frankly that he opened the conversation himself; he did not tell him why he had sent for him, but simply demanded certain information and so on, and told him he wanted to see him, and he came right over to his office, and I had a long talk with him."

The Court (after discussion): You may have your objection noted and an exception to the ruling. However, I am not disposed to permit the whole of this interview. As I stated yesterday, there are parts of it which I think are competent, and there are certain parts which I do not think are competent.

Mr. Marshall: Well, then, we will take it up piecemeal, your Honor. I will ask for the first part of it.

Mr. Davis: No, I think, if your Honor please, it would be better, if your Honor would be so good as to do so, if you will indicate by pencil marks in this memorandum, what you think is proper to inquire about.

The Court: I think without prejudice I can indicate from the bench sufficiently so that counsel will understand. I think the first part of this interview ought not to go in, down so far as these words contained in the printed record, and I presume the same is in all copies, on page 1740, I think, of your record, beginning with
63 the words, "Then he went on to say that for me to understand the matter it would be necessary for him to go back to his associations with Lamar." That may go in. Down to that, I think that ought to go in. You may except to the rulings, so far, admitting a portion of the interview.

Mr. Davis: Yes, sir.

By Mr. Marshall:

Q. We are now describing the interview with Mr. Lauterbach. Read the portions the Court permits you to read, and leave out the part excluded.

A. I will read from my memorandum dictated immediately afterwards, the whole of this interview just as my memorandum has it, leaving out those parts which the Court has indicated should not be given. (Reading): "The interview was too long for me to put it down in every detail, but his story was substantially this: Then he went on to say that for me to understand the matter it would be necessary for him to go back to his associations with Lamar. He had been with him in a number of matters, and he instanced some. Among them he mentioned the Third Avenue matters, in which Henry Hart and James R. Keene were involved; some attack on

the Smelting Company in New Jersey; some attack on the steel companies through J. Aspinwall Hodge. In one matter he said Lamar had been instrumental in Lauterbach's earning a very large fee—some $120,000 or $130,000—and that he, Lauterbach, had felt very grateful to Lamar for this, and their relations had continued more or less close, Lamar being accustomed to come in and out of his office, advise with him, and talk with him quite freely. Lauterbach further said that he had had a good deal to do in one
64 way or another for Mr. Morgan; that he had procured for Mr. Morgan the resignation of Gowen, the President of the Reading road, which Mr. Morgan regarded as very important, and he had brought about peace between Mr. Morgan and Gowen. He also said that at the time that steel stock was under heavy attack from the public press, when it went down to $8 a share, he had received money from Mr. Morgan, most of which he had used in newspaper work to stem the tide, but, that, perhaps, he had some surplus—a few thousand dollars—for himself. He had been Chairman of the County Committee for three years, and had been always glad during that period to do any proper thing that Mr. Morgan wanted, and that Mr. Morgan had found him very useful, and he thought that he had Mr. Morgan's confidence. He stated also that there were times when Mr. Morgan had used Lamar; that at one time Lamar had been very angry at Mr. Morgan and sent him some very improper letter, but that Lauterbach had afterwards made Lamar send an apologetic letter, but that Mr. Morgan refused to be mollified. The first thing he knew about the Steel Company investigation was when Lamar showed him a resolution which he had prepared to be introduced into the House providing for an investigation. He expostulated with Lamar and said it ought not to be done, but without effect. He then at once went to see Mr. Morgan, within a few minutes, indeed, after Lamar had shown him the resolution, and told Mr. Morgan about Lamar's showing him this resolution and what a dangerous condition it might bring about if it should be pressed, but he found that Mr. Morgan was unwilling to talk with him and told him he had better see Mr. Steele." (I interpose there to say that Mr. Steele was one of Mr. Morgan's partners.) "He then went to Mr Steele and told him about the resolution and
65 urged that something be done to stop the thing. He told Steele that he knew of the resolution from Lamar, and he thought he could control Lamar in the matter. He said Mr. Steele turned to cold steel and refused to discuss the matter with him; that while he was polite, he said there was nothing he cared to do about it. He also saw Mr. Davison——"

Q. (Mr. Marshall interrupting:) He is another of Mr. Morgan's partners?

A. He is another of Mr. Morgan's partners. (Continuing reading:) "He also saw Mr. Davison on one or two occasions, and Mr. Davison took the same attitude that Mr. Steele did, of practically declining to discuss the matter with him. He stated that he felt that the Morgan people felt that he was tied up in this matter with Lamar and simply represented Lamar in endeavoring to get something out

of them, although he said that he told Mr. Steele that he was not after money. He stated to me that his real object in going there was his regard for Mr. Morgan and that he did not, as a matter of fact, go as representing Lamar, but to see if he could not induce some action to be taken by them which would prevent Lamar's going on with the matter.

At a later stage he went down to Washington and looked over the situation and came to the conclusion that probably the leaders of the Democratic party did not want the investigation to proceed. He also became satisfied that President Taft did not wish it. He came back and went again to see Mr. Steele, but did not tell him that he had been to Washington. He stated to him on this occasion that he had looked into the situation and now felt confident of his ability to stop the thing, irrespective of Lamar and without necessarily working through Lamar; but he found that they still turned a deaf ear to him and declined to go into the matter with him at
66 all and said that there was nothing that they cared to do.

He stated that he had never seen Speaker Clark on this subject, he had never spoken to him but once in his life, and that interview had no relation to these matters. That he never represented to Mr. Steel or to anybody in the Morgan firm that he came with any authority from Speaker Clark, or from any leader, or from any member of the Democratic party, or from anybody in Washington, and he did not at any time after these interviews, or any of them, directly or indirectly, by writing, verbally by telephone, telegraph or otherwise communicate to any person the fact of his applications to the Morgan partners, or any of them, or of their declining to discuss the matter with him, or of their attitude. He made no such reports in any way, directly or indirectly, so that they should, or with the intent that they should, reach Speaker Clark or any leaders of the Democratic party in Congress."

I think, as you are asking me to give an account of this interview, that I should say these denials came in response to pointed questions put by me—"Did you do so and so, and did you do so and so?" The denials I have, the substance of his answers, but I have not here the questions I asked. They were in response to questions.

(Continuing reading:) "I asked him if he did not think that, going to Mr. Morgan as he did, it was quite reasonable that Mr. Morgan and his partners should consider him as enveloped in the atmosphere of Lamar, and he said that, looking back at it, he thought it was quite natural that they should have so considered."

I now leave out a part.

(Continuing reading:) "I said, 'Mr. Lauterbach, information about this matter has come to me in such a form that it seems
67 to be very serious for you, and I beg that you will be quite frank to me.' He said, 'Mr. Ledyard, I will tell you the truth, the whole truth. There is nothing about these transactions that I will not disclose to you frankly to the best of my ability and with truth.' "

"I then asked him if he knew when he received my telephone message, or had any information, what he was coming here for. He

said he did not. I asked him if he had any intimation or information that he might expect to have an interview with me. He said, 'None whatever.' I said, 'It has been stated that you did, or that you assumed to have the authority of certain gentlemen in Congress, among them Speaker Clark, to go to see the Morgan people, and that you afterwards reported to them that you had done so and found them defiant of the power of Congress in relation to these investigations, and that you and Lamar then pressed for the passage of the resolution for investigation, and that it was your reports of this defiant attitude on the part of these interests that gained for the investigation the support of some conservative elements in Congress, including the Speaker, and some who had been opposed to it.' He said, 'There is not one word of truth in any part of that.' He said, 'I also had a talk with Mr. Gary, at which Mr. Lindabury was present, and I think he added Mr. Stetson, but I am not sure of this; but that he got no more satisfaction from Mr. Gary than he did from Mr. Steele. I then asked him if he had ever known or heard of any person having telephoned Mr. Steele about the steel investigation, with a suggestion of stopping it. He hesitated quite a while and then said that he had. I asked him whether the telephoning person occupied any official position. He said, 'Yes, a member of
68 Congress.'"

"I asked him what initial his name began with, and he said 'R.' I asked him what district he represented—this is Mr. Lauterbach I was talking with—and he said 'A New York City district.' I asked him if he was a person employed in any particular way by any political leader. He said he was a man to whom Murphy's orders were given in the New York delegation. I then asked him if it was Riordan, and he said it was. I asked him whether he had any knowledge as to whether Riordan was empowered by any leaders in the party in Congress to approach Mr. Steele, and he said 'No.' I asked him if he knew any man prominent in the Democratic organization with whom Riordan had discussed these matters. He said he did. I asked him to describe that man. He said his name commenced with C, his first name with J, and he was a man who now occupies an important public position in New York and is recalcitrant at the present moment upon a matter of large public interest. I said 'John Sergeant Cram,' and he said 'Yes.' He said he had been present when Riordan had spoken to Cram about the steel investigation and stopping it, but that Cram had not paid much attention to it, and rather turned him down. I said, 'What object could any person have had in representing to the leaders in Congress, Speaker Clark or others, that you had reported that the attitude of these gentlemen here towards the investigation of their interests was defiant?" At first he said he did not see. I said, 'Who could have have had such an interest; could Lamar have had any?' He said, 'Well Lamar might have. Of course, I can see that he might have had that motive in order to enrage those men in Congress and excite their hostility and induce them to put the resolution through in a drastic form and thus de-

press the stock in the market. He might have had that mo-
69 tive for profit in stock market operations, but I cannot think of anybody else or any other motive.' He declared himself willing to do all that he could to aid in clearing up these matters. He said he was willing at any time to state anything that we had omitted today. I told him that I had been asked to see him, to procure his statement, and that I had been informed that the Speaker had lately expressed himself as disturbed over a doubt which has been cast upon the truth of the reports which he, Lauterbach, had been supposed to give relating to the attitude of these gentlemen in Wall Street. He said no one more than himself desired to have the whole matter cleared up. He said he had made no such reports, and was willing to have his entire connection with the matter known fully."

That is the end of that interview with Mr. Lauterbach of February 6th.

Mr. Davis: On the grounds of objection made to the introduction of these portions of that interview, we now move to strike out all of those portions of the interviews indicated by your Honor as admissible in evidence related by the witness.

The Court: The motion will be overruled and an exception noted.

Q. The interview you have just described with Mr. Lauterbach occurred on Thursday, February 6th, two days before Saturday, the 8th, 1913?

A. Yes, sir.

Q. So that you have narrated in the list the first interview which you had with Lauterbach?

A. The first interview I have had with Mr. Lauterbach was on the sixth. The interview that I related yesterday was on Saturday afternoon, late in the afternoon of the eighth. The interview
70 to which I have just testified was two days before, on the Thursday, the sixth.

Q. Well, now, I want to ask you to take your mind to the morning of Saturday, February 8th, at the time you were called up on the telephone by some Mr. Palmer, Congressman Palmer, supposed to be Congressman Palmer, and I ask you to tell me what you did in the way of trying to find out who this man was on the wire asking for you?

Mr. Davis: If your Honor please, to save the time of the Court and the labors of counsel, we admit for the purposes of this trial, that the person talking at the other end of the 'phone, with Mr. Ledyard on these occasions, calling himself Congressman P., was the defendant, David Lamar.

The Court: Will you take it?

Mr. Marshall: It relieves me of proving these telephone conversations.

The Court: Very well.

Q. You testified about these same matters that you testify to here, before the sub-Committee of the Committee on the Judiciary

of the United States Senate in the early part of July, the second of July, I believe, 1913?

A. I testified. I was summoned before that Committee in July, 1913.

Q. You read your testimony from these notes that you have produced here?

A. The testimony I gave before that Committee consisted in part of my reading the same notes which I have read here, and more notes.

Q. You testified to some notes there that you have not testified to here?

A. I testified to some notes there concerning which I have not been interrogated here.

71 Q. And while you were sitting there testifying, Mr. Ledyard, was the defendant Lamar sitting near you?

A. Yes, he sat right up close to me on my left. It was the first time I had ever seen Mr. Lamar to know who he was.

Q. Was he sitting there all through the time that you detailed these conversations with the supposed Congressman Palmer?

A. I think he was sitting within three or four feet of me to my left. He was—the witness chair in which I sat was elevated on a platform like this, and he was—oh, quite as close to me as the stenographer here, within three of four feet, I should think; during the whole of my testimony I think he sat there.

Q. After you got off the stand did Lamar come up and speak to you?

A. Yes.

Q. What did he say?

A. I think at that time there was an adjournment of the session, or recess, and he came up to me and he said, "Commodore, you have got a wonderful memory; you have got it all down just right," or words to that effect; I have forgotten; I cannot swear to the exact language, but it was about like that.

Q. I want to ask you about the firm of J. P. Morgan & Company. Were these gentlemen members of it in February, 1913; J. P. Morgan, Edward T. Stotesbury, Charles Steele, J. Pierpont Morgan, Jr., Henry P. Davison, Temple Bowdoin, Arthur E. Newbold, William Pierson Hamilton, William H. Porter, Thomas W. Lamont and Horatio G. Lloyd?

A. They were. I am quite sure of all except Mr. Lloyd, who was a junior partner, and I don't remember just when he came in; otherwise all of those men were members.

Q. Except for the possible exception of Mr. Lloyd, the other gentlemen named were members of the firm in the month

72 of February, 1913?

A. They were.

Q. I think you testified yesterday that Mr. Morgan, Sr., died on the last day of March, 1913?

A. He did.

Q. Now, as to the Steel Corporation, the United States Steel

Corporation, was that organized in Mr. Morgan's office, or in the office of J. P. Morgan & Company?

A. It was.

Q. And had there always been some member of the firm of Morgan on the Board of the Steel Corporation?

A. I think Mr. Morgan, Sr., had always, from the time of its organization up to his death, been a member of the Board of Directors and the chief committee, the Finance Committee, and at least one other member of the firm had been also a Director of the company; at one time it was Mr. Bacon, when he was a member, and after he retired it was, I think, Mr. Steele.

Q. Then that relationship between the Morgan firm and the Steel Corporation had existed since the organization?

A. From the organization of it, and they were one of the bankers of the Steel Corporation?

Q. That is, the firm of J. P. Morgan & Company were one of the banks of the Steel Corporation?

A. Yes, sir.

Mr. Davis: If your Honor please, this testimony was given by Mr. Ledyard, in my knowledge of the facts, subject to what I am now about to say: I don't consider it relevant. It may be connected up hereafter in such a way as to make it relevant, but pending connection, we now move to strike it all out as irrelevant.

The Court: The motion will be denied.

73 Mr. Davis: And an exception noted?

The Court: Yes.

Mr. Marshall: Mr. Davis very kindly consented to my putting it in in this way because Mr. Morgan's partner died this morning and he was not able to do so.

Cross-examination by Mr. Davis:

Q. While you were having these telephone conversations with the fictitious Mr. Palmer, you knew all the time it was not Mr. Palmer who was talking?

A. I believed it was not Mr. Palmer.

Q. And before they were actually finished, you did, as a fact, know that it was not Mr. Palmer; you knew, for instance, respecting the conversation of February 8th, that it was not the real Pa-mer?

A. I very early communicated with the real Palmer, and he informed me that he had had no talks with me, and I did not suppose it was possible he had had.

Q. And I mean before that conversation of February 8th began, you knew the man at the other end of the wire was not the real A. Mitchell Palmer?

A. I knew it was not the real Mitchell Palmer, and I thought I knew who it was.

PAUL D. CRAVATH, a witness called by the prosecution, being first duly sworn, testified as follows:

Direct examination by Mr. Marshall:

Q. You are a member of the Bar?
A. I am.
Q. And have been for many years?
A. I have.
Q. You were summoned as a witness in this Senate investigation where Mr. Ledyard testified?
A. I was.
Q. Did you hear his testimony?
A. I did.

74 Q. Did you see Mr. Lamar sitting there at the time Mr. Ledyard was testifying?

A. I did.
Q. Were you with Mr. Ledyard when he came off the stand?
A. I was.
Q. When Mr. Ledyard came off the stand?
A. I was.
Q. Did you hear Mr. Lamar speak to Mr. Ledyard?
A. I did.
Q. What did he say? What did Mr. Lamar say?
A. Mr. Lamar said in substance, "Mr. Ledyard, you have a wonderful or remarkable memory, I think it was one or the other of those adjectives, and then added in substance, "Things happened just as you have testified."

Mr. Marshall: That is all.
Mr. Davis: No cross examination.
Witness excused.

Mr. Marshall: I offer in evidence an exemplified copy of the certificate of incorporation of the United States Steel Corporation.
Mr. Davis: It is unnecessary, your Honor, to encumber the record with this. We admit that the United States Steel Corporation was and is a body corporate.
Offer withdrawn.
Mr. Marshall: I offer in evidence an authenticated certificate of the Clerk of the House of Representatives of the resolution under which the so-called Stanley Committee was appointed.
Mr. Davis: This is objected to, as irrelevant and immaterial; no objection is made as to the form of authentication.
The Court: Received.
Mr. Davis: I except.
Marked Government's Exhibit No. 3.

75 Mr. Marshall: In this is the certificate of the appointment of the Committee and then the resolution.

Mr. Davis: I object to each of them, and the same grounds go to each.

Mr. Marshall: I read the exhibit because it is not necessary to read the certificate.

The Court: Just read the resolution.

Mr. Davis: Now, your Honor, I want your Honor's attention directed to the date of this resolution which was, according to this certificate, adopted by the House of Representatives May 4, 1911, nearly two years back of the matter under inquiry.

Mr. Marshall: There are a number of conversations, and my theory is that it was the stock in trade of these people.

The Court: I think I understand you. It will be admitted.

Mr. Davis: An exception.

The exhibit was read as follows:

EXHIBIT 3.

Office of the Clerk of the House of Representatives of the United States of America.

Washington, D. C.

Certificate.

I, South Trimble, Clerk of the House of Representatives of the United States of America, do hereby certify that the following resolution is a true, perfect and correct copy of House Resolution Number One Hundred and Forty-eight (148), adopted by the House of Representatives of the United States of America on the fourth day of May, Nineteen Hundred and Eleven, in the first session of the Sixty-second Congress, the original of which is now on file
76 and a part of the official records of my office:

Resolved, That a committee of nine Members, to be elected by the House, be, and is hereby, directed to make an investigation for the purpose of ascertaining whether there have occurred violations by the United States Steel Corporation, or other corporations or persons as hereinafter set out, of the antitrust act of July second, eighteen hundred and ninety, and the acts supplementary thereto, the various interstate-commerce acts, and the acts relative to the national-banking associations, which violations have not been prosecuted by the executive officers of the Government; and if any such violations are disclosed, said committee is directed to report the facts and circumstances to the House.

Said Committee is also directed to investigate the United States Steel Corporation, its organization and operation, and if in connection therewith violations of law as aforesaid are disclosed, to report the same.

Said committee shall inquire whether said Steel Corporation has any relations or affiliations in violation of law with the Pennsylvania Steel Company, the Cambria Steel Company, the Lackawanna Steel Company, or any other iron or steel company.

Also whether said Steel Corporation, through the persons owning

its stock, its officers or agents, has or has had relations with the Pennsylvania Railroad Company, or any other railroad company, or any coal companies, national-banking companies, trust companies, insurance companies, or other corporate organizations or companies, or with the stockholders, directors, or other officers or agents of said companies, or with any person or persons,
77 which have caused or have a tendency to cause any of the results following:

First. The restriction or destruction of competition in production, sale, or transportation.

Second. Excessive capitalization and bonding of corporations.

Third. Combinations created by ownership or control by one corporation, or the stockholders or bond holders thereof, of the stock or bonds of other corporations, or combinations between the officers or agents of one corporation and the officers or agents of other corporations by duplication of directors or other means and devices.

Fourth. Speculations in stocks and bonds by agreement among officers and agents of corporations to depress the value of the stocks and bonds of other corporations for the purpose of acquiring or controlling same.

Fifth. Profits through such speculation to officers or agents of such corporations to the detriment of the stockholders and the public.

Sixth. Panics in the bond, stock, and money markets.

Said committee shall in its report recommend such further legislation by Congress as in its opinion is desirable.

Said committee, as a whole or by subcommittee, is authorized to sit during sessions of the House and the recess of Congress, to employ clerical and other assistance, to compel the attendance of witnesses, to send for persons and papers, and to administer oaths to witnesses.

The Speaker shall have authority to sign and the Clerk
78 to attest subpœnas during the recess of Congress.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the House of Representatives of the United States of America, on this the fourteenth day of November, Nineteen Hundred and Fourteen.

[SEAL.]

SOUTH TRIMBLE,
Clerk of the House of Representatives of the United States,
By J. C. YOUTH, *Chief Clerk.*

Office of the Clerk of the House of Representatives of the United States of America.

Washington, D. C.

Certificate.

I, South Trimble, Clerk of the House of Representatives of the United States of America, do hereby certify that the following resolution is a true, perfect and correct copy of House Resolution Num-

ber One Hundred and Seventy-one (171), adopted by the House of Representatives of the United States of America, on the sixteenth day of May, Nineteen Hundred and Eleven, as taken from the Journal of said House of Representatives for the first session of the Sixty-second Congress at page 205:

On motion of Mr. Henry of Texas the following privileged resolution was considered and agreed to:

House Resolution 171.

Resolved, That the following Members shall constitute the committee provided for in House resolution 148; Augustus O.
79 Stanley (chairman), Charles L. Bartlett, Jack Beall, Martin W. Littleton, Daniel J. McGillicuddy, Marlin E. Olmsted, H. Olin Young, J. A. Sterling, H. G. Danforth.

A motion by Mr. Henry of Texas to reconsider the vote by which said resolution was adopted was, on his motion, laid on the table.

In testimony whereof, I have hereto set my hand and affixed the official seal of the House of Representatives of the United States of America, at the City of Washington, in the District of Columbia, on this the fourteenth day of November, Nineteen Hundred and Fourteen.

[SEAL.] SOUTH TRIMBLE,
Clerk of the House of Representatives of the United States,
By J. C. YOUTH, *Chief Clerk.*

Mr. Marshall: The Government rests.

Mr. Davis: If your Honor please, before making the motion which we have in mind to make, going to the whole case of the Government, we ask your Honor to strike from the record the testimony of the witness Ledyard with reference to the personnel of the firm of Morgan & Company and the relation thereto of that partnership to the corporation, the steel corporation, so-called, named in the indictment, upon the ground that there is no evidence tending to show that the defendant was aware of the personnel of the partnership or any relation that it might have to that corporation.

The Court: The motion will be denied.

Mr. Davis: And an exception?

The Court: Your exception will be noted.

At this point the jury was excused.

Mr. Davis: Now, if your Honor please, we move to strike
80 from the record the entire testimony of Mr. Ledyard and, separately, his testimony as to each of these reported conversations with the defendant, upon these grounds: In the very outset of the conversations Mr. Ledyard frankly disclaimed any relation to either the firm of Morgan & Company or the steel corporation, and no one of these communications could have been made by the defendant to anyone having such relation either to Morgan & Company or the steel corporation as to bring them within the

purview of this section of the Code under which we are proceeding. The testimony stands as a narrative of conversations had with the defendant, of conversations which, when they were had, obviously could not have been communicated to either one of the persons, that is, the partnership or the corporation named in the indictment, except by the gratuitous act of Mr. Ledyard, which gratuitous act of performance was negatived in the outset by his disclaimer of any such relation to the parties as that he was a proper person to receive those communications, and on that ground, first, we move to strike from the record all of the testimony of Mr. Ledyard, and the testimony of Mr. Ledyard separately and severally as to each of these separate and several conversations.

The Court: The motion will be denied. The only fair inference that can be drawn from the evidence in the case is that the communications which were being made to Mr. Ledyard were intended by the defendant to be communicated to J. P. Morgan & Company and the Steel Corporation, and the communications were made to him, it may fairly be inferred, because of the fact that he said that he was in the confidence of the representatives of those concerns and had a very intimate and close friendship for certain members of the firm of J. P. Morgan & Company. He was to be used as the
81 conduit, it may be fairly inferred from the evidence.

Mr. Davis: You Honor will note an exception?

The Court: Exception will be noted.

Mr. Davis: Now, if your Honor please, I assign a second ground for this same motion to strike out the testimony of Mr. Ledyard and all of these conversations, and as to each of them separately and severally, upon this ground, that the narrative of these conversations themselves, and everything else in the case, fail wholly to show that these representations emanating from the defendant were within the meaning of the statute in that in making them he was taking on himself to act as a member of Congress.

The third ground, if your Honor please, for this motion, which is still to strike out the testimony of Mr. Ledyard as to all of these conversations, and as to each of them separately, is that no one of these conversations discloses any attempt to defraud, whether Mr. Ledyard, the partnership of Morgan & Company, or the Steel Corporation, the body corporate.

The Court: So far as this motion is concerned, I do not deem the grounds urged relevant to it at all. It is not a question here of the sufficiency of the testimony, it is the question as to whether or not it should have been admitted. The motion that you are now making, and the argument, is entirely beside the mark, so far as this particular motion is concerned, and it will be denied.

Mr. Davis: And an exception noted?

The Court: An exception will be noted. I may add that the question presented by you which has just been made and overruled, does not go to the sufficiency of the evidence to establish each and every element of the offence charged, but goes to the question
82 of whether or not it is material and competent in establishing any elements of the offense charged.

Mr. Davis: If your Honor please, I move your Honor now to instruct this jury, without further proceeding, to render a verdict of not guilty in this case. I will ask, now, your Honor to instruct this jury to acquit the defendant upon the ground that the Government has not made a case on the facts. I will say to your Honor that we rest.

The Court: Very well.

Mr. Davis: I do not know the practice here, but in my jurisdiction the practice is for the Government to ask its instructions and then for the defense to ask its instructions.

The Court: So far as I know, the practice is simply to hand up your requests. If you care to discuss them you may do so.

The requests were here handed to the Court, as follows:

December 3, 1914.

Defendant's Requests for Instruction to the Jury.

1. You are instructed that upon all the testimony in the case your verdict should be not guilty.

2. You are instructed that the burden is upon the United States to establish beyond a reasonable doubt every essential allegation of the indictment and if, upon the whole testimony you have a reasonable doubt whether the United States has established any one of such allegations, your verdict should be not guilty.

3. You are instructed that the defendant is presumed to be innocent of the offense charged against him in the indictment, and that this presumption attends him throughout the trial until you
83 shall reach your verdict; and that such presumption must be considered by you as any fact established by the testimony and must prevail unless you find it overcome and overthrown by the testimony beyond a reasonable doubt in your mind.

4. Even though you may find, from the testimony, that the defendant falsely assumed and pretended to be a person named in the indictment, namely—A. Mitchell Palmer a member of the Congress of the United States, you may not find the defendant guilty under the indictment in this cause, unless you further find that in so pretending and assuming to be such person, the defendant sought and intended to defraud the persons and the corporation named in the indictment or some or one of them, and if you fail so to find, your verdict should be not guilty.

5. You are instructed that the section of the Penal Code of the United States upon which the indictment in this cause is founded, makes it a criminal offense for any one, with intent to defraud either the United States or any person, falsely to assume or pretend to be an officer of the Government of the United States and in addition thereto either to take upon himself to act as such or in such pretended character to demand or obtain from any person or from the United States or any department or any officer of the Government thereof any valuable thing; that the indictment in this cause charges the defendant with having falsely assumed or pretended to

be an officer of the Government of the United States, to wit, a member of the House of Representatives of the United States of America, and to have taken upon himself to act as such with intent to defraud the persons and corporation named in the indictment, or
84 some, or any of them; and that in order to find the defendant guilty, you must accordingly find established by the testimony beyond a reasonable doubt each and all of the following matters, namely:

1. That the defendant falsely assumed and pretended to be an officer of the Government of the United States, as aforesaid.

2. That he took upon himself to act as such, that is to say, to do some act within the province of a Member of the House of Representatives of the Congress of the United States.

3. That he so did, with intent to defraud the persons and corporation named in the indictment, or some, or one of them, and if you fail to find, from the testimony, any one of these several matters beyond a reasonable doubt, your verdict should be not guilty.

Mr. Davis: I want, your Honor, to be heard certainly, on the first of these requests, and probably on all of them.

The Court: Perhaps it will save time for me to state that certain of these requests will be given either verbatim or in substance incorporated in the charge and instructions to the jury. The second will be given, as I say, either verbatim or in substance. The third will be given, and the fourth I think should be given. The fifth should be given perhaps with some modifications and amplifications as to the second matter of the list there set forth.

Mr. Davis: Will your Honor hear me briefly as to the first?

The Court: Yes.

The first request was thereupon discussed by counsel.

The Court: I shall submit this case to the jury, gentle-
85 men. Many questions have been argued, upon which my decision has already been made, and it is useless to repeat anything that has been said in that regard. I see nothing in the authorities that have been cited to me, or in the arguments of counsel, to change my mind upon the question as to whether a member of Congress is an officer of the United States, and as I have taken occasion to say during the progress of the trial, the jury must be instructed in this case that the offence with which this respondent is charged is made up of at least three elements, or ingredients: First, the assuming and pretending to be a member of Congress; second, an intent to defraud the persons named in the indictment or some one of them; and, third, the taking upon himself to act as a member of Congress.

In construing the statute, effect must be given to every word contained in it. That is a fundamental rule of construction of statutes. Congress is presumed to have employed each word in the statute with some meaning, some definite meaning. It must be that Congress intended that the "taking upon himself to act as an officer" means something different from assuming and pretending to be an officer, otherwise Congress would not have used the term "Take upon himself to act as such."

It must be also assumed that this expression contained in the statute means something more than to act, otherwise Congress would have said, it would have been a simple way to have expressed it, "shall falsely assume or pretend to be an officer of the United States and shall act as such." That would have been the simple way to have expressed it if Congress did not intend anything more than act.

86 To my mind this expression means "impersonating an officer in action." I think that is the best way in which I can express it. To take upon himself to do some act that involves not only the obligation to do it, the promise to do it, and the agreement to do it, but the impersonation, personating the officer in action. The term "shall falsely assume or pretend to be an officer," means impersonating an officer in name and appearance, as distinguished from acting or impersonating an officer in action. I cannot agree with counsel for the defendant, however, that there can be no personating within the purview of this statute except by doing some act which would be within the rightful province of a real officer to perform. I think that the act that is there referred to is something with relation to the facts or the official character—something pertaining to them. It is an act which might be performed by the officer who is being impersonated, but not necessarily a lawful act or a rightful act, but it is something that relates to his official character as distinguished from individual or as an individual, and I shall instruct the jury in substance to that effect. So far as the intent to defraud is concerned, I shall instruct the jury that they must find, if satisfied from the evidence in the case, that the intent of this defendant in doing what he did do, was to secure by deceit and deceitfully, the payment of money by some one of these parties named in this indictment to Mr. Lauterbach, they must find for the Government. The jury may be recalled.

Mr. Davis: Will your Honor note an exception?

The Court: Yes, an exception may be noted.

Mr. Davis: For refusal to grant the first request for instruction?

The Court: Yes, the first request will be denied.

87 The jury was recalled.

Counsel for the defendant and for the Government then addressed the jury.

Whereupon the Court, of its own motion, charged the jury as follows:

SESSIONS, *J.*:

GENTLEMEN OF THE JURY: The indictment in this case contains two counts, but the same offence is charged in both counts. Therefore the indictment will be treated as containing but one count, and a charge of but one offence.

In substance, the offence charged against this respondent is that in February, 1913, he falsely, knowingly, and wilfully did assume and pretend to be an officer of the Government of the United States; namely, a member of the Congress of the United States, with the intent to defraud Mr. Lewis Cass Ledyard, Mr. J. P. Morgan, the other members of the firm of J. P. Morgan & Company, and the

United States Steel Corporation, and that he then and there, and with that intent to defraud, took upon himself to act as a Congressman of the United States.

The law presumes this respondent to be innocent of the charge here made against him, and throws around him the protection of that presumption. Therefore, it will be your duty as jurors to commence your deliberations with the presumption of his innocence uppermost in your minds, and to continue your deliberations with that presumption uppermost in your minds, until you become convinced of his guilt by the evidence in the case, and beyond a reasonable doubt. This presumption of innocence is real and actual, and you must consider it as you consider any fact which has been proven in the case. This presumption of innocence throws upon the
88 Government the burden of establishing each and every essential element or ingredient of the offence charged against this respondent by evidence which satisfies you of the truth thereof beyond a reasonable doubt.

By the term reasonable doubt is meant exactly what it implies, a doubt for which there is a reason. It is not a mere imaginary doubt; it is not a mere possible doubt; it is not a captious doubt; it is not a doubt based upon bias or prejudice or sentiment. It is, and it must be, a fair doubt. It is, and it must be, an honest doubt. It must grow out of the evidence in the case, and it must be based upon reason and common sense. Both this respondent and the Government are entitled to the exercise of your best judgment and your common sense in determining the questions that are here presented to you. No juror has a right, arbitrarily, and without reason, to say that he has a doubt, and refuse to convict. On the other hand, no juror who has a reasonably fair and honest doubt as to the guilt of this respondent has a right to convict. If you have such a reasonable doubt as to the guilt of this respondent it will be your duty to acquit him. On the other hand, if you have no such reasonable doubt as to his guilt, it will be equally your duty to convict him.

The respondent in this case has not taken the witness stand, and has not testified in his own behalf. You have no right to draw any inference unfavorable to him from the fact that he has not testified in this case. He and his counsel had a right to take such a course as they saw fit in that regard, and it is not for you to inquire into the motives or the reasons which actuated this respondent in not taking the stand in his own behalf. The burden is upon the Gov-
ernment to establish his guilt.
89 The statute upon which this indictment is founded is, in substance, this:

"Whoever, with the intent to defraud either the United States or any person, shall falsely assume or pretent to be an officer of the Government of the United States, and shall take upon himself to act as such, shall be guilty of an offence against the United States, and shall be punished.

As I have said before, this indictment closely follows the language of the statute, and charges that this respondent did falsely assume and pretend to be a member of the Congress of the United States,

namely, A. Mitchell Palmer, a Representative in Congress from the 26th Congressional District of the State of Pennsylvania, and with the intent to defraud Mr. Ledyard, Mr. Morgan, the other members of the firm of Morgan & Company, and the United States Steel Corporation; and that with that intent he did take it upon himself to act as Congressman Palmer.

You will thus observe that there are at least three essential elements or ingredients of the offence charged against this respondent; and to warrant a conviction of the respondent you must be satisfied, by the evidence in the case, and you must find, first, that this respondent, at the time charged, did falsely as-ume and pretend to be Congressman Palmer. Second, that he did then and there take upon himself to act as Congressman Palmer, and, third, that in assuming and pretending to be Congressman Palmer, and taking upon himself to act as Congressman Palmer, he intended to defraud the men whose names are mentioned in the indictment, or some one of them.

The first question, then, which presents itself is this: Did this respondent, in February, 1913, assume and pretend to be Con-
90 gressman Palmer? It is conceded and established that at that time Mr. A. Mitchell Palmer was a member of Congress from the 26th Congressional District of the State of Pennsylvania. It is also conceded that at that time this respondent did talk over the telephone with Mr. Ledyard; and if you find that in that conversation over the telephone he asserted and stated and represented that it was Mr. Palmer, the congressman, talking, you will find that he did then and there assume and pretend to be Congressman Palmer.

The second question that is presented for your consideration is, perhaps, the more difficult one. It is this: Did he then and there take upon himself to act as Congressman Palmer? What is meant by the term "take upon himself to act as an officer?" It is difficult to define accurately the term or expression contained in the statute upon which this indictment is founded, "shall take upon himself to act as such," but it is approximately and sufficiently correct and accurate to say that to take upon oneself to act as an officer means to assume and undertake to act as such officer, and to do some act which such officer might do in connection with and in relation to his office. To assume and pretend to be a member of Congress is to impersonate a member of Congress in name or appearance, while to take upon oneself to act as a member of Congress is to impersonate such member of Congress in official conduct and actions. However, to warrant a finding against the respondent upon this element or branch of the case, it will not be necessary for you to find that he, in the assumed and pretended character and role of Congressman Palmer, did an act which the real Congressman Palmer might and could have done rightfully and lawfully.

But in that regard it will be sufficient if you find that his
91 actions, even though they would have been wrongful if performed and done by a congressman in fact, fairly and apparently pertained and related to the acts of a member of Congress, and you also find that he, at the same time, claimed to be acting in an official capacity as a member of Congress, and not as an individual or a mere political leader.

The defendant in this case claims that even though he may have assumed and pretended to be Congressman Palmer, yet that he did no act in the official character of Congressman Palmer. That what he did, and all that he did, was done as an individual, or, at most, as one of the leaders of the then dominant political party in Congress.

The defendant contends that the facts which are established in this case do not show that he claimed or attempted to act as a congressman in his official capacity as a congressman.

The Government, on the other hand, contends that what he did was claimed by him at that time to be in an official character, and not as an individual, and not as a mere leader of the dominant political party; that he assumed to act in his pretended official character as a congressman. The Government claims that one of the purposes, or the pretended purposes of his action and conduct at that time was to obtain the approval and co-operation of the firm of Morgan & Company, and of the United States Steel Corporation with relation to contemplated legislation which would affect their business interests. The Government also claims that another pretended purpose of his actions at that time was to prevent legislation which would be hostile to the business interests of the country, including the business interests of this firm and this corporation. Those purposes, on the part of a real congressman, might have been or might not
92 have been legitimate and rightful, depending upon the conditions and circumstances. To apply the matter to the claimed facts of this case, if you find, in this case, and from the evidence, that this respondent, in calling up Mr. Ledyard by telephone, in talking with him over the telephone, in sending him Mr. Lauterbach, or in procuring a meeting between Mr. Lauterbach and Mr. Ledyard, claimed or asserted, or pretended to be acting in his official character of a congressman of the United States, and not merely as an individual, or a political leader, you will be warranted in finding against him upon this branch of the case.

Even though you may find that he pretended and assumed to be a congressman, if you find that he did not claim to act or presume to act, in his official character as a congressman in these matters, you must acquit him. The charge in this case is that he took upon himself to act as a congressman, and not as a political leader or as an individual.

The third question for your determination is this, if you find against the respondent upon the other two questions: In assuming and pretending to be Congressman Palmer, and in taking upon himself to act as Congressman Palmer, did he intend to defraud some one of the persons mentioned in the indictment, namely, Mr. Ledyard, the members of the firm of Morgan & Company, or the United States Steel Corporation. In the language of one of the requests referred — by counsel for the defendant, even though you may find from the testimony that the defendant falsely assumed and pretended to be a person named in the indictment, namely, A. Mitchell Palmer, a member of the Congress of the United States, you may not find the defendant guilty under the indictment in this cause, unless you further

find that in so pretending and assuming to be such person, the
93 defendant sought and intended to defraud the persons and the corporation named in the indictment, or some or one of them, and if you fail so to find, your verdict should be not guilty.

The Government claims that in his conduct and actions there was a cunning and shrewd scheme by which he intended, fraudulently, deceitfully, by misrepresentation, to obtain the payment of money to Mr. Lauterbach. To warrant a finding against the respondent upon this branch of the case, it is not necessary that you should find that he intended to procure money for himself. It is sufficient if you find that he intended to defraud one or more of these persons named in the indictment by procuring him or them to pay money to Mr. Lauterbach, who it is claimed, was his confederate in this matter.

The defendant contends that the facts which have been established in the case do not show any intent on his part to obtain the payment of money by any one of these persons to Mr. Lauterbach. That is a question for you to determine as the other questions in the case are for you to determine.

In determining the intent with which any person acts upon any occasion, it is impossible to look directly into the mind of that person and to read there what his intent is or was. But the intent of a person in any action must be gathered from his conduct, from his statements, from the circumstances and conditions surrounding him and surrounding the transaction and occurrence under consideration, from a picture of the whole matter. And in this case you must determine what the intent of this respondent was in this matter by his
conduct, by his statements, from the circumstances, from the
94 conditions which are shown by the evidence to have surrounded this alleged transaction. In determining each and every question which is presented to you for your determination, it will be your duty carefully to consider all the evidence in the case, the oral testimony of the witnesses, the documentary evidence; and not only that, but all the circumstances and conditions surrounding this respondent, and surrounding this alleged transaction, as those conditions and circumstances are shown by the evidence in the case, and from the evidence in the case, and from those conditions and circumstances, you will reach a verdict.

If you find, from the evidence in the case, that this respondent did assume and pretend to be A. Mitchell Palmer, a member of the Congress of the United States, and that he did take it upon himself to act as such Congressman, and that, in assuming and pretending to be such Congressman, and taking it upon himself to act as such Congressman, he intended to defraud one or more of the persons named in this indictment, you will convict him. If you are not so satisfied from the evidence, you should acquit him.

Thereupon counsel for the defendant excepted as follows:

Mr. Davis: If your Honor please, before the jury retires, we desire to note an exception to that portion of your Honor's charge in which you say to the jury that if the defendant, in taking upon himself to act as a Congressman, claimed to be acting as such in an official capacity, that would suffice to justify the jury in finding that he was

so taking upon himself to act as a Congressman in his official capacity; our point being, that no matter what he pretended in that behalf, whether in fact he took upon himself to act as a Congressman in his official capacity, must be determined by the jury in
95 accordance with what they find he actually did, and that if what he actually did was not to act as a Congressman in his official capacity, he did not take upon himself to act as such, no matter what his pretense or claim was.

The Court: The exception will be noted, but the instructions to the jury were not as stated by counsel.

Mr. Davis: Well, then, I am glad to be corrected, but out of abundant caution, as I heard it, your Honor, will allow me an exception.

The Court: The exception is noted.

Mr. Davis: Moreover, from what your Honor says, I fear the jury will receive the impression that it is sufficient to establish an intent to defraud, if the payment of money by any one of the persons named in the indictment to Mr. Lauterbach was in contemplation, I think your Honor should say to the jury: "The wrongful payment of money." In other words, if the jury should be of the opinion, notwithstanding the defendant's contention that it was not in his contemplation at all that there should be any money paid, yet that was the unexpressed intent in the premises.

The Court: I do not care to add anything to the instructions already given. The exception will be noted.

Mr. Davis: I am asking your Honor to hear my exception.

The Court: I understood you were through.

Mr. Davis: Pardon me, I am not, the point being that even though it was the object of the defendant to procure the payment of a fee to Mr. Lauterbach, if that fee were to be paid for services properly rendered and voluntarily undertaken to be paid for by the
96 persons named in the indictment, or any one of them, that would not involve defrauding them.

The Court: The exception will be noted, but the assumption that counsel makes does not fit the facts in this case.

Mr. Davis: Pardon me, one more point. Your Honor has not spoken of the contention that was made in the argument to your Honor yesterday on the motion to grant the first instruction for the defendant, that there is no evidence in this case of the commission of an offense within the territorial jurisdiction of this Court, and to your Honor's failure so to state to the jury we respectfully note an exception.

The jury returns to Court at 12:10 o'clock P. M., and renders a verdict of guilty as charged in the indictment.

Mr. Williams: If it please the Court, we move to set aside the verdict upon the ground that it is contrary to the evidence, contrary to the law, and contrary to the Judge's charge.

We also move, if it please the Court, for an arrest of judgment, upon the grounds heretofore stated in the demurrer, with the same effect as though now repeated in full. I suppose your Honor will pass upon both of those motions immediately?

The Court: Each of the motions will be denied and an exception noted.

Mr. Marshall: If your Honor please, I move for sentence.

The Court: Mr. Lamar, have you anything to say why the judgment of the Court should not now be passed upon you for the offense of which you stand convicted?

Mr. Lamar: I have not your Honor.

97 The Court: In your case, Mr. Lamar, the judgment of the Court is that you be taken from here to the United States Penitentiary at Atlanta, and there be confined for the full term and period of two years from and including this day.

The foregoing contains all of the testimony given at the trial, and all of the foregoing procedings were had and exceptions taken and noted by the Court before the jury retired to consider of its verdict; and because the same would otherwise not appear of record the defendant prays the Court to sign this, his bill of exceptions, to have the same force and effect as to each of said exceptions as though the same were set forth in a separate bill of exceptions, which is granted; and, accordingly, the Court signs this, the defendant's bill of exceptions, to have the force and effect aforesaid, now for then, this 20th day of January, A. D. 1915.

C. W. SESSIONS, *Judge.*

Notice of Settlement waived.
Jan. 14, 1915.

H. SNOWDEN MARSHALL.
U. S. Attorney, S. D. of N. Y.

98 *Assignments of Error.*

United States District Court, Southern District of New York.

DAVID LAMAR, Plaintiff-in-Error,
v.
UNITED STATES OF AMERICA, Defendant-in-Error.

Now comes the above-named David Lamar, plaintiff-in-error, by his attorney, Carl E. Whitney, Esq., and makes and files the following assignments of error upon which he will rely upon the prosecution of the writ of error to the United States Circuit Court of Appeals for the Second Circuit, sued out by him to review the errors committed in the above entitled cause in the United States District Court for the Southern District of New York and in the proceedings had therein and against him in the said Court:

That the said District Court erred as follows:

First. In not sustaining the demurrer to the indictment herein, upon the ground that the indictment did not charge the defendant with an offense against the United States or any law thereof.

Second. In not granting defendant's motion at the trial to quash the indictment herein upon the ground that the same did not charge

the defendant with any offense against the United States or any law thereof.

99 Third. In not granting the motion in arrest of judgment on the ground that the indictment did not charge an offense against the United States or any law thereof.

Fourth. In not setting aside the verdict upon th ground that the facts proved did not constitute an offense against the United States or any law thereof.

Fifth. In overruling the defendant's demurrer to the indictment herein.

Sixth. In not sustaining the said demurrer to the indictment herein upon the grounds therein set forth.

Seventh. In denying the defendant's motion made at the opening of the trial, to quash the indictment upon the following grounds:

1. That within the meaning of Section 32 of the Federal Penal Code, otherwise called the United States Criminal Code, a member of the House of Representatives of the Congress of the United States of America, is not an officer of the United States or of the Government of the United States.

2. That within the meaning of Section 32 of the Federal Penal Code otherwise called the United States Criminal Code, a member of the House of Representatives of the Congress of the United States of America is not an officer acting under the authority of the United States.

3. That within such meaning, a member of the said House of Representatives is not an officer acting under the authority
100 of an officer of the Government of the United States.

4. That within the meaning of the Constitution of the United States, a member of the House of Representatives of the Congress of the United States of America, is not an officer of the United States or of the Government of the United States.

5. That neither said indictments *and* any count thereof charges the defendant with any offense against the United States or any law thereof.

6. That neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant assumed or pretended to be an officer acting under the authority of the United States, to-wit, a member of the House of Representatives of the Congress of the United States as therein undertaken to be alleged.

7. That neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant assumed or pretended to be an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America.

8. That neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant took upon himself to act as an officer of the Government of the United States, to wit, a member of the House of Repre-
101 sentatives of the Congress of the United States of America.

9. That neither the said indictment nor any count thereof

sufficiently or at all alleges in what manner, particular or respect the defendant took upon himself to act as an officer acting under the authority of the United States.

10. That the said indictment and the matters therein contained in manner and form are not sufficient in law and that the defendant is not bound under the law of the land to answer the same.

Eighth. In denying the defendant's motion made at the opening of the trial to dismiss or quash the indictment herein and each and every count thereof upon the grounds set forth in the foregoing assignments of error, and upon the additional ground that the indictment does not specify grounds sufficient to warrant the Court to proceed with the case, in that the language of the indictment does not bring it within the language of Section 32 of the Federal Penal Code, upon which the same purports to rest, for that the indictment in each count charges the defendant with assuming and pretending to be an officer of the Government of the United States, to wit, a member of the House of Representatives, and does not charge within the language of said Section 32 that he falsely assumed and pretended to be an officer acting under the authority of the United States; that the indictment is in language not within the meaning of the statute; that there is a distinction between the language of the statute, an officer acting under the authority of the United States, and the language of the indictment, an
102 officer of the United States; and that the statute embraces not only the impersonation of an officer but of an officer acting at the time under the authority of the United States, while the language of the indictment merely embraces an officer acting merely in the capacity of an individual and not under the authority of the United States.

Ninth. In not granting defendant's motion to dismiss and quash the indictment herein upon the ground that said indictment is insufficient in law in that it does not inform the defendant of the nature and cause of the accusation against him, as required by Article VI of the Amendments to the Constitution of the United States, with a certainty sufficient to enable the defendant to plead a judgment thereon as a bar to any subsequent prosecution for the same offense.

Tenth. In admitting the testimony of the witness, Lewis Cass Ledyard, as to a conversation which he had with one Edward Lauterbach, over the objection of counsel for plaintiff-in-error that such testimony was incompetent, irrelevant and immaterial.

Eleventh. In receiving in evidence a certain paper offered by counsel for the Government over the objection of plaintiff-in-error, being Government's Exhibit 2, a longhand memorandum made by the witness Lewis Cass Ledyard in the presence of Edward Lauterbach February 8, 1913, on the ground that the same was incompetent, immaterial and irrelevant.

Twelfth. In denying the defendant's motion to strike out that part of the testimony of the witness Lewis Cass Ledyard as to conversations between such witness and one Edward Lauterbach,
103 upon the ground that such testimony was incompetent, immaterial and irrelevant.

Thirteenth. In denying the defendant's motion to strike out all of the testimony of the witness Lewis Cass Ledyard as to the membership of the firm of J. P. Morgan & Company, upon the ground that said testimony was incompetent, irrelevant and immaterial.

Fourteenth. In receiving in evidence a certain paper offered by counsel for the Government over the objection of the plaintiff-in-error, being Government's Exhibit 3, an authenticated certificate of the Clerk of the House of Representatives of the resolution under which the so-called Stanley Committee was appointed.

Fifteenth. In denying the defendant's motion made at the conclusion of the Government's case to strike out all of the testimony of the witness Lewis Cass Ledyard with reference to the personnel of the firm of J. P. Morgan & Company and the United States Steel Corporation, upon the ground that there was no evidence tending to show that the defendant was aware of the personnel of said firm of Morgan & Company or any relation that said firm might have to the Steel Corporation.

Sixteenth. In refusing to strike out the testimony of the said witness Ledyard that the United States Steel Corporation, in the indictment mentioned, was organized in the office of the said J. P. Morgan & Company; that one member of the said firm of J. P. Morgan & Company had always been a member of the Board of Directors of said corporation; and that from the organization of the said corporation the said firm was one of the bankers thereof,
104 on the ground that it was incompetent, immaterial and irrelevant.

Seventeenth. In denying the defendant's motion to strike out the entire testimony of the witness Lewis Cass Ledyard and especially those parts of said testimony as to each conversation had by said witness with the defendant, upon the ground that such testimony was incompetent, immaterial and irrelevant.

Eighteenth. In denying the defendant's motion to dismiss the indictment herein or to instruct the jury to acquit the defendant made at the conclusion of the case as presented by the United States upon all the grounds contained in the seventh and eighth assignments of error, and upon the further ground that the indictment does not charge a crime within the jurisdiction of the Federal Courts; that upon all the facts proven the defendant is not guilty; that there is no proof that the defendant acted with intent to defraud the persons and the corporations named in the indictment; that there is no proof that defendant in committing the acts proven on the trial falsely assumed or pretended to be an officer or employee acting under the authority of the United States, or any department or any officer of the Government thereof or took upon himself to act as such; that there is no proof to show that the crime, if there was a crime, was committed in the Southern District of New York; that as a matter of law a member of the House of Representatives of the United States is not an officer of the United States within the meaning of the statute under which this prosecution is brought; that there is no evidence in the case that the defendant pretended or assumed to be a member of the House of Representatives of the

Congress of the United States other than by conversation over
105 the telephone; that as a matter of law the crime specified in Section 32 of the United States Criminal Code, and alleged in the indictment herein, of falsely assuming or pretending to be an officer of the Government of the United States and taking upon himself to act as such, is not committed where all the evidence adduced in the case shows merely conversations had and statements made by telephonic communication.

Nineteenth. In denying the defendant's motion to dismiss the indictment herein or to advise the jury to acquit the defendant made at the conclusion of the whole case upon the grounds hereinbefore set forth in Paragraph 18th.

Twentieth. That the Trial Court erred in refusing to charge the jury as requested by the defendant as follows:

"You are instructed that upon all the testimony in the case your verdict should be not guilty."

Twenty-first. In not instructing the jury that upon all the facts appearing from the testimony there was no evidence to show that the United States District Court for the Southern District of New York had jurisdiction of the said cause, for that there was no evidence to show that the crime alleged in the indictment was committed in the said Southern District of New York.

Twenty-second. In not instructing the jury that upon all the facts appearing from the testimony there was no evidence that the plaintiff-in-error, defendant as aforesaid, took upon himself to act as an officer of the United States, as alleged in the indictment.

Twenty-third. That the Trial Court erred in charging the jury as follows:

106 "The defendant in this case claims that even though he may have seemed and pretended to be Congressman Palmer, yet that he did no act in the official character of Congressman Palmer. That what he did and all that he did, was done as an individual or, at most, as one of the leaders of the then dominant political party in Congress.

"The defendant contends that the facts which are established in this case do not show that he claimed or attempted to act as a Congressman in his official capacity as a Congressman.

"The Government on the other hand, contends that what he did was claimed by him at that time to be in an official character, and not as an individual, and not as a mere party leader of the dominant political party; that he assumed the act in his pretended official character as a Congressman. The Government claims that one of the purposes, or the pretended purposes of his action and conduct at that time was to obtain the approval and co-operation of the firm of Morgan & Company, and of the United States Steel Corporation with relation to contemplated legislation which would affect their business interests. The Government also claims that another pretended purpose of his actions at that time was to prevent legislation which would be hostile to the business interests of the country, including the business interests of this firm and this corporation. Those purposes, on the part of a real Congressman, migh

have been or might not have been legitimate and rightful, depending upon the conditions and circumstances. To apply the matter to the claimed facts of this case, if you find, in this case,
107 and from the evidence, that this respondent, in calling up Mr. Ledyard by telephone, in talking with him over the telephone, in sending him Mr. Lauterbach, or in procuring a meeting between Mr. Lauterbach and Mr. Ledyard, claimed or asserted, or pretended to be acting in his official character of a Congressman of the United States, and not merely as an individual, or a political leader, you will be warranted in finding against him upon this branch of the case" (Record, pp. 55-56),

to which exception was duly noted by counsel for the defendant as follows:

"Mr. Davis: If your Honor please, before the jury retires, we desire to note an exception, to that portion of your Honor's charge in which you say to the jury that if the defendant in taking upon himself to act as a Congressman claimed to be acting in such an official capacity, that would suffice to justify the jury in finding that he was so taking upon himself to act as a Congressman in his official capacity; our point being that no matter what he pretended in that behalf, whether in fact he took upon himself to act as a Congressman in his official capacity, must be determined by the jury, in accordance with what they find he actually did, and if what he actually did was not to act as a Congressman in his official capacity, he did not take upon himself to act as such, no matter what his pretense or claim was.

"The Court: Exception will be noted on the instructions to the jury were not as stated by counsel.

108 "Mr. Davis: Well, then, I am glad to be corrected, but out of abundant caution, as I heard it, your Honor will allow me an exception.

"The Court: The exception is noted."

Twenty-fourth. That the Trial Court erred in further charging the jury as follows:

"But the intent of a person in any action must be gathered from his conduct, from his statements from the circumstances and conditions surrounding him and surrounding the transaction and occurrence under consideration, from a picture of the whole matter. And in this case you must determine what the intent of this respondent was in this matter by his conduct, by his statements, from the circumstances, from the conditions which are shown by the evidence to have surrounded this alleged transaction."

To which defendant duly excepted.

Twenty-fifth. In not instructing the jury whether the action of the plaintiff-in-error, defendant as aforesaid, as the same might be found by the jury to be established by the evidence, did or did not constitute the taking by the plaintiff-in-error, defendant as aforesaid, upon himself to act as an officer of the United States, as alleged in the indictment.

Twenty-sixth. In instructing the jury that if the said plaintiff-

in-error, defendant as aforesaid, claimed or asserted, or pretended t
be acting in his official character of a Congressman of the Unite
States, and not merely as an individual or a political leade
109 the jury would be warranted in finding that the said plain
tiff-in-error, defendant as aforesaid, took upon himself t
act as an officer of the United States, to wit, as such Congressma
as aforesaid.

Twenty-seventh. In instructing the jury that whether the actio
aforesaid of the said plaintiff-in-error, defendant as aforesaid, con
stituted taking by him upon himself to act as such officer as afore
said, might be determined by the jury from the statement in tha
behalf of the said plaintiff-in-error, without regard to the questio
whether, notwithstanding such statement, such action, did or di
not constitute such taking upon himself to act as such officer.

Twenty-eighth. In refusing to charge the jury that it was no
sufficient to establish an intent to defraud upon the part of the de
fendant, if the payment of money by any one of the persons name
in the indictment to Mr. Lauterbach was in contemplation, unles
such conduct contemplated the wrongful payment of money.

Twenty-ninth. In refusing to charge the jury that if the defend
ant's object in procuring the payment of the fee to Mr. Lauterbac
was to obtain a fee in payment of services properly rendered an
voluntarily undertaken to be paid for, that then the jury could no
find the defendant guilty of an intent to defraud.

Thirtieth. In charging the jury that it would be sufficient fo
them in order to find the defendant guilty to find that his actions
even though they would have been wrongful if performed and don
by a Congressman in fact, fairly and apparently pertained and re
lated to the acts of a member of Congress.

110 Thirty-first. In submitting to the jury the question as t
whether or not the acts of the defendant came within th
province of a person taking upon himself to act as an officer actin
under the authority of the United States without defining what act
came within the province of an officer acting under the authority o
the United States.

Thirty-second. In refusing to charge the jury that they coul
not convict the defendant unless they found from the evidence tha
the offense was committed within the territorial jurisdiction of th
United States District Court for the Southern District of New York

Thirty-third. In denying the defendant's motion to set aside th
verdict of the jury rendered against him, which motion presente
to the Trial Court was as follows:

That the verdict was contrary to the evidence, contrary to the la
and contrary to the charge of the Court.

Thirty-fourth. In denying the defendant's motion for an arre
of judgment upon all the grounds hereinbefore set forth.

Thirty-fifth. In overruling the demurrer to the indictment an
thereby depriving the defendant of his right under the Sixth Articl
of the Amendments to the Constitution of the United States "to b
informed of the nature and cause of the accusation."

Thirty-sixth. In denying the defendant's motion for the dire

tion of a verdict made at the close of the whole case and
111 thereby violating the defendant's right under the Sixth Article of the Amendments to the Constitution of the United States "to be informed of the nature and cause of the accusation."

Thirty-seventh. In denying the defendant's motion in arrest of judgment and thereby depriving the defendant of his right under the Sixth Article of the Amendments to the Constitution of the United States "to be informed of the nature and cause of the accusation."

Thirty-eighth. In submitting to the jury the question of whether a member of the House of Representatives of the Congress of the United States, as described and defined in the Constitution of the United States is an officer of the United States.

Thirty-ninth. In submitting to the jury the question of whether a member of the House of Representatives of the Congress of the United States, as described and defined in the Constitution of the United States is an officer acting under the authority of the United States.

Fortieth. In denying the defendant's motion for the direction of a verdict of not guilty and thereby violating the defendant's right under the Sixth Article of the Amendments to the Constitution of the United States to a trial in the "district wherein the crime shall have been committed."

Forty-first. In denying defendant's motion in arrest of judgment and thereby violating the defendant's right under the Sixth Article of the Amendments to the Constitution of the United States to a trial in the "district wherein the crime shall have been committed."

Forty-second. In holding and deciding that a member of
112 the House of Representatives of the Congress of the United States is an officer of the United States or of the Government of the United States within the meaning of Article I of the Constitution of the United States.

Forty-third. The Court erred in divers other matters manifest upon the face of the record.

Wherefore, the said David Lamar, plaintiff-in-error, prays that the said judgment herein for the errors aforesaid and for the errors in the record and proceedings herein may be reversed and altogether held for nothing, and that his said trial should go for naught and that the said plaintiff-in-error may be restored to all things which he has lost by reason of said judgment, and for such other and further relief as to the Court may seem proper.

Dated May 21st, 1915.

CARL E. WHITNEY,
Attorney for Plaintiff-in-Error,
DAVID LAMAR.

Office and Post Office Address, 15 William Street, Borough of Manhattan, New York City.

113 *Citation.*

By the Honorable Julius M. Mayer, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To the United States of America, Defendant-in-Error, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the United States Court House and Post Office Building, in the Borough of Manhattan, City, County and State of New York, in said Circuit, within thirty days from the date hereof pursuant to a writ of error filed in the office of the Clerk of the United States District Court for the Southern District of New York, Wherein David Lamar is plaintiff-in-error and you are defendant-in-error, to show cause if any there be, why the order and judgment in said writ mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan in the City, County and State of New York, in the District and Circuit above named, this 21st day of May, in the year of our Lord one thousand nine hundred and fifteen and of the independence of the United States the one hundred and thirty-ninth.

JULIUS M. MAYER,
Judge of the U. S. District Court for the Southern District of New York, in the Second Circuit.

114 *Stipulation Settling Record.*

United States District Court, Southern District of New York.

DAVID LAMAR, Plaintiff-in-Error,
v.
UNITED STATES OF AMERICA, Defendant-in-Error.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled cause as agreed on by the parties.

Dated May 26th, 1915.

CARL E. WHITNEY,
Attorney for Plaintiff-in-Error.
H. SNOWDEN MARSHALL,
United States Attorney, Southern District of New York, Attorney for Defendant-in-Error.

115 *Clerk's Certificate.*

United States District Court, Southern District of New York.

DAVID LAMAR, Plaintiff-in-Error,
v.
UNITED STATES OF AMERICA, Defendant-in-Error.

I. Alex. Gilchrist, Jr., Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled cause as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York, this 27th day of May, in the year of our Lord one thousand nine hundred and fifteen and of the independence of the United States the one hundred and thirty-ninth.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

116 United States Circuit Court of Appeals, Second Circuit.

DAVID LAMAR, Plaintiff in Error (Defendant Below),
vs.
UNITED STATES, Defendant in Error (Plaintiff Below),

You will please take notice that upon the affidavit of Harold Harper hereto annexed and the exhibits thereto appended, the undersigned will move this Court at a stated term thereof appointed to be held in and for the Second Circuit, at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 4th day of October, 1915, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, for an order dismissing the Writ of Error herein upon the ground of a prior and inconsistent Writ of Error pending in the Supreme Court of the United States at the time said Writ was allowed and for such other and further relief as may be just in the premises.

Yours, etc.,

H. SNOWDEN MARSHALL,
U. S. Attorney, Southern District of New York,
Attorney for Defendant in Error.

Office and P. O. Address: U. S. Court House and P. O. Bldg., Borough of Manhattan, City of New York.

To Carl E. Whitney, Esq., Attorney for Plaintiff in Error, 15 William Street, New York City.

117 United States Circuit Court of Appeals, Second District.

DAVID LAMAR, Plaintiff in Error (Defendant Below),
vs.
UNITED STATES, Defendant in Error (Plaintiff Below).

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Harold Harper, being duly sworn, deposes and says that he is an Assistant to the United States Attorney for the Southern District of New York, the attorney for the defendant in error in the above entitled cause.

The plaintiff in error, David Lamar, was on the 3rd day of December, 1914, duly convicted in the United States District Court for the Southern District of New York upon an indictment charging him with falsely assuming and pretending to be an officer of the Government of the United States with intent to defraud certain persons, in violation of § 32 of the United States Criminal Code. Thereafter and on the 25th day of January, 1915, said Lamar presented to the Honorable Augustus N. Hand, a District Judge of the United States of the Southern District of New York, his petition for a Writ of Error from the Supreme Court of the United States, a copy whereof is hereto annexed, marked Exhibit A, complaining that certain errors were committed by the trial court to his prejudice:

"First. In respect to the Court's jurisdiction of the subject-matter of the cause, as to which a certificate is granted pursuant to Section 238 of the Judicial Code.

118 Second. In respect to the Court's construction and application of the Constitution of the United States and its disposition of the merits of the cause; all of which will more in detail appear from the assignment of errors which is filed with this petition."

Judge Hand noted at the foot of said petition his allowance of the writ, as more fully appears from said Exhibit A, and certified to the Supreme Court that the jurisdiction of the court is in issue, as appears from said certificate, a copy whereof is hereto annexed, marked Exhibit B. A Writ of Error from the Supreme Court of the United States in the usual form was allowed and issued on the 25th day of January, 1915. A copy of said Writ of Error is hereto annexed, marked Exhibit C. Said Lamar upon the same day filed certain forty-three assignments of error. These assignments are not limited to the question of the jurisdiction of the trial court, but also relate to the claim of the said Lamar that the court erred in construing and applying the Constitution of the United States and to the merits of the case generally. A copy of said assignments of error is hereto annexed, marked Exhibit D. A citation was duly issued on said 25th day of January, 1915, directing the United States to appear before the Supreme Court within thirty days, and the said United States has duly appeared by its Solicitor-General. A copy of said citation is hereto annexed, marked Exhibit E. The record in the case was filed in the office of the Clerk of the Supreme Court on April 6, 1915.

A certified extract from the minutes of the Clerk of the Su-
119 preme Court showing the proceedings heretofore had therein is annexed hereto, marked Exhibit F. The case is pending and undetermined.

The Writ of Error from this court was issued upon the same judgment upon which the said Writ of Error, Exhibit C, was issued from the Supreme Court of the United States, to-wit, the judgment and conviction of the said Lamar for the offence heretofore mentioned, rendered on the 3rd day of December, 1914. The Writ of Error in this court was issued May 21, 1915.

By reason of the foregoing, deponent respectfully requests that an order be made and entered dismissing the Writ of Error herein upon the ground of said prior and inconsistent Writ of Error pending in the Supreme Court of the United States and for such other and further relief as may be just in the premises.

HAROLD HARPER.

Sworn to before me this 20th day of September, 1915.
[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co., No. 215.

Cert. filed in N. Y. Co. No. 181.
Register's No. Kings Co. No. 7068.
Register's No. N. Y. Co. No. 7172.
My commission expires Mar. 30, 1917.

120 "A."

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA
vs.
DAVID LAMAR.

Now comes the above defendant, David Lamar, by his attorney, and complains that on the 3rd day of December, 1914, the District Court of the United States for the Southern District of New York gave judgment in the above entitled cause against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant:

First. In respect to the Court's jurisdiction of the subject-matter of the cause, as to which a certificate is granted pursuant to Section 238 of the Judicial Code.

Second. In respect to the Court's construction and application of the Constitution of the United States and its disposition of the merits of the cause; all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the said defendant, David Lamar, prays for the allowance of a Writ of Error and for such other orders and processes as may cause all and singular the record and proceedings in said

cause to be sent to the Honorable the Justices of the Supreme
121 Court of the United States under and according to the laws of the United States in that behalf made and provided, and so that the same being inspected, the said Justices of the said Supreme Court of the United States cause further to be done therein to correct that error what of right and according to law ought to be done, and also that an order be made herein that all other proceedings in this action in this court be suspended and stayed until the determination of said Writ of Error by the said Supreme Court of the United States.

And your petitioner will ever pray, etc.

Dated, this 25th day of January, 1915.

CARL E. WHITNEY,
Attorney for Defendant, David Lamar.

Office and Post Office Address, 15 William Street, Borough of Manhattan, New York City, N. Y.

Writ of Error, to operate as a supersedeas, allowed, returnable, according to law, the defendant to furnish bail in the sum of Ten Thousand Dollars, conditioned according to law, subject to the approval of one of the Judges of the United States District Court for the Southern District of New York.

Dated, January 25, 1915.

AUGUSTUS N. HAND,
Judge of the United States District Court for the Southern District of New York.

122 "B."

United States District Court, Southern District of New York.

DAVID LAMAR, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant-in-Error.

In this case, the District Court of the United States for the Southern District of New York hereby certifies that the defendant demurred to quash, the indictment herein before the trial and moved for an arrest of judgment after the verdict, upon the ground that the acts charged in the indictment did not constitute an offence against the United States or any law thereof, and that, therefore, the Court was without judisdiction in the premises, and that he moved to set aside the verdict on the ground that the facts proven on the trial did not constitute an offence against the United States or any law thereof, and that therefore the Court was without judisdiction in the premises, and that in the overruling of the demurrer and the denial of said motions, and in holding that the acts charged in the indictment, or proven on the trial, constituted an offence against the laws of the United States, the Court sustained its jurisdiction of the cause, and that its jurisdiction was in issue herein.

This certificate is made conformable to Section 238 of the Judicial Code of the United States.

Dated January 25, 1915.

AUGUSTUS N. HAND,
U. S. District Judge, Southern District of New York.

123 "C."

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the District Court before you or some of you between the United States of America, complainant, and David Lamar, defendant, a manifest error hath happened to the great damage of the said defendant as it is said and appears by his complaint,

We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Justices of the Supreme Court of the United States, together with this Writ, so that you have the same at the Capitol in the City of Washington, D. C. before the Justices aforesaid, on the 24th day of February, 1915; that the record and proceedings aforesaid being inseptced, the said Justices of the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

124 Witness the Honorable Edward D. White, Chief Justice of the United States this 25th day of January, in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States, the one hundred and thirty-ninth.

(Sgd.) ALEX. GILCHRIST, JR.
[SEAL.] *Clerk of the U. S. District Court for the Southern District of New York, in the Second Circuit.*

The foregoing Writ is hereby allowed:

(Sgd.) AUGUSTUS N. HAND,
Judge of the United States District Court for the Southern District of New York.

125 "D."

United States District Court, Southern District of New York.

DAVID LAMAR, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant-in-Error.

Now comes the above named David Lamar, plaintiff-in-error, by his attorney, and makes and files the following assignments of error upon which he will rely upon the prosecution of the Writ of Error to the Supreme Court of the United States sued out by him herein to review the errors committed in the above entitled cause in the United States District Court for the Southern District of New York and in the proceedings had therein and against him in the said court:

That the District court erred as follows with respect to its jurisdiction, as certified pursuant to Section 238 of the Judicial Code:

First. In not sustaining the demurrer to the indictment herein, upon the ground that the same did not charge the defendant with any offense against the United States or any law thereof, and that, therefore, the Court was without jurisdiction in the premises.

Second. In not granting defendant's motion at the trial
126 to quash the indictment herein upon the ground that the same did not charge the defendant with any offense against the United States or any law thereof, and that, therefore, the Court was without jurisdiction in the premises.

Third. In not granting the motion to arrest judgment on the ground that the indictment did not charge an offense against the United States or any law thereof, and that, therefore, the Court was without jurisdiction in the premises.

Fourth. In not setting aside the verdict upon the ground that the facts proved did not constitute an offense against the United States or any law thereof, and that, therefore, the Court was without jurisdiction in the premises.

That the District Court erred in the construction and application of the Constitution of the United States and in the disposition of the merits of the case as follows:

Fifth. In overruling the defendant's demurrer to the indictment herein.

Sixth. In not sustaining the said demurrer to the indictment herein upon the grounds therein set forth.

Seventh. In denying the defendant's motion made at the opening of the trial, to direct the jury to return a verdict of not guilty upon the following grounds:

127 1. That within the meaning of Section 32 of the Federal Penal Code, otherwise called the United States Criminal Code, a member of the House of Representatives of the Congress of the United States of America, is not an officer of the United States or of the Government of the United States.

2. That within the meaning of Section 32 of the Federal Penal

Code otherwise called the United States Criminal Code, a member of the House of Representatives of the Congress of the United States of America is not an officer acting under the authority of the United States.

3. That within such meaning, a member of the said House of Representatives is not an officer acting under the authority of an officer of the Government of the United States.

4. That within the meaning of the Constitution of the United States, a member of the House of Representatives of the Congress of the United States of America, is not an officer of the United States or of the Government of the United States.

5. That neither the said indictment nor any count thereof charges the defendant with any offense against the United States or any law thereof.

6. That neither the said indictment nor any count thereof
128 sufficiently or at all alleges in what manner, particular or respect the defendant assumed or pretended to be an officer acting under the authority of the United States, to wit, a member of the House of Representatives of the Congress of the United States as therein undertaken to be alleged.

7. That neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant assumed or pretended to be an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America.

8. That neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant took upon himself to act as an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America.

9. That neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular, or respect the defendant took upon himself to act as an officer acting under the authority of the United States.

10. That the said indictment and the matters therein contained in manner and form are not sufficient in law and that the de-
129 fendant is not bound under the law of the land to answer the same.

Eighth. In denying the defendant's motion made at the opening of the trial to dismiss or quash the indictment herein and each and every count thereof upon the grounds set forth in the first assignment of error.

Ninth. In not granting defendant's motion to dismiss and quash the indictment herein upon the ground that said indictment is insufficient in law in that it does not inform the defendant of the nature and cause of the accusation against him, as required by Article VI of the Amendments to the Constitution of the United States, with a certainty sufficient to enable the defendant to plead a judgment thereon as a bar to any subsequent prosecution for the same offense.

Tenth. In admitting the testimony of the witness, Lewis Cass Led-

yard, as to a conversation which he had with one Edward Lauterbach, over the objection of counsel for plaintiff-in-error that such testimony was incompetent, irrelevant and immaterial. That the trial court, in admitting the testimony of the witness, Lewis Cass Ledyard, over the objection of counsel for plaintiff-in-error, as aforesaid, necessarily did then and there determine what acts could be performed by a member of the House of Representatives of the Congress of the United States in an official capacity, and only by a construction and application of Article I of the Constitution of the
130 United States could such a determination be reached.

Eleventh. In receiving in evidence a certain paper offered by counsel for the Government over the objection of plaintiff-in-error, being Government's Exhibit 2, a longhand memorandum made by the witness Lewis Cass Ledyard in the presence of Edward Lauterbach February 8, 1913. That the trial court in so admitting said exhibit over the objection of the plaintiff-in-error, as aforesaid, did then and there determine what acts could be performed by a member of the House of Representatives of the Congress of the United States in an official capacity, and only by a construction and application of Article I of the Constitution of the United States could such a determination be reached.

Twelfth. In denying the defendant's motion to strike out that part of the testimony of the witness Lewis Cass Ledyard as to conversations between such witness and one Edward Lauterbach, upon the ground that such testimony was incompetent, immaterial and irrelevant. That in so denying defendant's motion, as aforesaid, the trial court necessarily did then and there determine what acts could be performed by a member of the House of Representatives of the Congress of the United States in an official capacity and only by a construction and application of Article I of the Constitution of the United States could such a determination be reached.

Thirteenth. In denying the defendant's motion to strike
131 out all of the testimony of the witness Lewis Cass Ledyard as to the membership of the firm of J. P. Morgan & Company, upon the ground that said testimony was incompetent, irrelevant and immaterial. That in so denying defendant's motion as aforesaid, the trial court necessarily did then and there determine what acts could be performed by a member of the House of Representatives of the Congress of the United States in an official capacity, and only by a construction and application of Article I of the Constitution of the United States could such a determination be reached.

Fourteenth. In receiving in evidence a certain paper offered by counsel for the Government over the objection of plaintiff-in-error, being Government's Exhibit 3, an authenticated certificate of the Clerk of the House of Representatives of the resolution under which the so-called Stanley Committee was appointed.

Fifteenth. In denying the defendant's motion made at the conclusion of the Government's case to strike out all of the testimony of the witness Lewis Cass Ledyard with reference to the personnel of the firm of J. P. Morgan & Company and the United States Steel Corporation, upon the ground that there was no evidence tending

to show that the defendant was aware of the personnel of said firm of Morgan & Company or any relation that said firm might have to the Steel Corporation.

Sixteenth. In refusing to strike out the testimony of the said witness Ledyard that the United States Steel Corporation, in the indictment mentioned, was organized in the office of the said J. P. Morgan & Company; that one member of the said firm of J.
132 P. Morgan & Company had always been a member of the Board of Directors of the said corporation; and that from the organization of the said corporation the said firm was one of the bankers thereof.

Seventeenth. In denying the defendant's motion to strike out the entire testimony of the witness Lewis Cass Ledyard and especially those parts of said testimony as to each conversation had by said witness with the defendant, upon the ground that such testimony was incompetent, immaterial and irrelevant. That in so denying defendant's motion, as aforesaid, the trial court necessarily did then and there determine what acts could be performed by a member of the House of Representatives of the Congress of the United States in an official capacity, and only by a construction and application of Article I of the Constitution of the United States could such a determination be reached.

Eighteenth. In denying the defendant's motion to dismiss the indictment herein or to instruct the jury to acquit the defendant made at the conclusion of the case as presented by the United States upon all the grounds contained in the first assignment of error, and upon the further ground that the indictment does not charge a crime within the jurisdiction of the Federal courts; that upon all the facts proven the defendant is not guilty; that there is no proof that the defendant acted with intent to defraud the persons and the corporations named in the indictment; that there is no proof that defendant in committing the acts proven on the trial falsely assumed or pretended to be an officer or employee acting under the authority of the United States, or any department or any officer of the Government thereof or took upon himself to act as such; that
133 there is no proof to show that the crime, if there was a crime, was committed in the Southern District of New York; that as a matter of law a member of the House of Representatives of the United States is not an officer of the United States within the meaning of the statute under which this prosecution is brought; that there is no evidence in the case that the defendant pretended or assumed to be a member of the House of Representatives of the Congress of the United States other than by conversations over the telephone; that as a matter of law the crime specified in Section 32 of the United States Criminal Code, and alleged in the indictment herein, of falsely assuming or pretending to be an officer of the Government of the United States and taking upon himself to act as such, is not committed where all the evidence adduced in the case shows merely conversations had and statements made by telephonic communication. That in so denying defendant's motion as aforesaid, the trial court necessarily did then and there determine what acts could be

performed by a member of the House of Representatives of the Congress of the United States in an official capacity, and only by a construction and application of Article I of the Constitution of the United States could such a determination be reached.

Nineteenth. In denying the defendant's motion to dismiss the indictment herein or to advise the jury to acquit the defendant made at the conclusion of the whole case upon the grounds hereinbefore set forth. That in so denying defendant's motion, as aforesaid, the trial court necessarily did then and there determine what
134 acts could be performed by a member of the House of Representatives of the Congress of the United States in an official capacity, and only by a construction and application of Article I of the Constitution of the United States could such a determination be reached.

Twentieth. That the trial court erred in refusing to charge the jury as requested by the defendant as follows:

"You are instructed that upon all the testimony in the case your verdict should be not guilty." (Record, p. 48.)

the court saying in denying such a motion,

"I cannot agree with counsel for the defendant, however, that there can be no personating within the purview of this statute except by doing some act which would be within the rightful province of a real officer to perform. I think that the act that is there referred to is something with relation to the facts or the official character, something pertaining to them. It is an act which might be performed by the officer who is being impersonated, but not necessarily a lawful or rightful act, but is something that relates to his official character as distinguished from individual or as an individual and I shall instruct the jury in substance to that effect." (Record p. 51.)

That the denial, in the language above set forth, of the defendant's request to charge involved a construction and application of the Constitution of the United States, Article I thereof, in this, to wit, that it involved a determination of what acts could be performed by a member of the House of Representatives of the Congress of the United States, and that only by an interpretation and application of Article I of the said Constitution of the United States could such a determination be reached and that the determination reached by the court in the premises was erroneous.

135 Twenty-first. In not instructing the jury that upon all the facts appearing from the testimony there was no evidence to show that the United States District Court for the Southern District of New York had jurisdiction of the said cause, for that there was no evidence to show that the crime alleged in the indictment was committed in the said Southern District of New York.

Twenty-second. In not instructing the jury that upon all the facts appearing from the testimony there was no evidence that the plaintiff-in-error, defendant as aforesaid, took upon himself to act as an officer of the United States, as alleged in the indictment.

Twenty-third. That the trial court erred in charging the jury as follows:

"The defendant in this case claims that even though he may have seemed and pretended to be Congressman Palmer, yet that he did no act in the official character of Congressman Palmer. That what he did and all that he did, was done as an individual or, at most, as one of the leaders of the then dominant political party in Congress.

"The defendant contends that the facts which are established in this case do not show that he claimed or attempted to act as a Congressman in his official capacity as as Congressman.

"The Government, on the other hand, contends that what he did was claimed by him at that time to be in an official character, and not as an individual, and not as a mere leader of the dominant political party; that he assumed the act in his pretended official character as a Congressman. The Government claims that one of the purposes, or the pretended purposes of his action and conduct at that time was to obtain the approval and co-operation of the firm of Morgan & Company, and of the United States Steel Corporation with relation to contemplated legislation which would affect their business interests. The Government also claims that another pretended purpose of his actions at that time was to prevent legislation which would be hostile to the business interests of the country, including the business interests of this firm and this corporation. Those purposes, on the part of a real Congressman, might have been or might not have been legitimate and rightful, depending upon the conditions and
136 circumstances. To apply the matter to the claimed facts of this case, if you [illegible] in this case, and from the evidence, that this respondent, in calling up Mr. Ledyard by telephone, in talking with him over the telephone, in sending him Mr. Lauterbach, or in procuring a meeting between Mr. Lauterbach and Mr. Ledyard, claimed or asserted, or pretended to be acting in his official character of a Congressman of the United States, and not merely as an individual, or a political leader, you will be warranted in finding against him upon this branch of the case. (Record pp. 55-56.)

to which exception was duly noted by counsel for the defendant as follows:

Mr. Davis: If your Honor please, before the jury retires, we desire to note an exception, to that portion of your Honor's charge in which you say to the jury that if the defendant in taking upon himself to act as a Congressman claimed to be acting in such an official capacity, that would suffice to justify the jury in finding that he was so taking upon himself to act as a Congressman in his official capacity; our point being that no matter what he pretended in that behalf, whether in fact he took upon himself to act as a Congressman in his official capacity, must be determined by the jury, in accordance with what they find he actually did, and if what he actually did was not to act as a Congressman in his official capacity, he did not take upon himself to act as such, no matter what his pretense or claim was."

The Court: Exception will be noted on the instructions to the jury were not as stated by counsel.

Mr. Davis: Well, then I am glad to be corrected, but out of abundant caution, as I heard it, your Honor will allow me an exception."

The Court: The exception is noted.

(Record 57-58.)

That in determining in the language aforesaid what acts could be performed by a member of the House of Representatives of the Congress of the United States, in an official capacity, the Trial Court necessarily construed and applied the Constitution of the United States, Article 1 thereof, and that only by the construction and application of such Article 1 of the Constitution could the powers and functions of a member of the House of Representatives of the Congress of the United States be defined and determined by the
137 court.

Twenty-fourth. That the Trial court erred in further charging the jury as follows:

"But the intent of a person in any action must be gathered from his conduct, from his statements from the circumstances and conditions surrounding him and surrounding the transaction and occurrence under consideration, from a picture of the whole matter. And in this case you must determine what the intent of this respondent was in this matter by his conduct, by his statements, from the circumstances, from the conditions which are shown by the evidence to have surrounded this alleged transaction."

Twenty-fifth. In not instructing the jury whether the action of the plaintiff-in-error, defendant as aforesaid, as the same might be found by the jury to be established by the evidence, did or did not constitute the taking by the plaintiff-in-error, defendant as aforesaid, upon himself to act as an officer of the United States, as alleged in the indictment.

Twenty-sixth. In instructing the jury that if the said plaintiff-in-error, defendant as aforesaid, claimed or asserted, or pretended to be acting in his official character of a Congressman of the United States, and not merely as an individual or political leader, the jury would be warranted in finding that the said plaintiff-in-error, defendant as aforesaid, took upon himself to act as an officer of the United States, to-wit, as such Congressman as aforesaid.

Twenty-seventh. In instructing the jury that whether the action aforesaid of the said plaintiff-in-error, defendant as aforesaid, constituted taking by him upon himself to act as such officer as aforesaid, might be determined by the jury from the statement in that behalf of the said plaintiff-in-error, defendant as aforesaid, without regard to the question, whether, notwithstanding such statement, such action, did or did not constitute, such taking upon himself to
138 act as such officer as aforesaid.

Twenty-eighth. In refusing to charge the jury that it was not sufficient to establish an intent to defraud upon the part of the defendant, if the payment of money by any one of the persons named in the indictment to Mr. Lauterbach was in contemplation, unless such conduct contemplated the wrongful payment of money.

Twenty-ninth. In refusing to charge the jury that if the defendant's object in procuring the payment of the fee to Mr. Lauterbach was to obtain a fee in payment of services properly rendered and voluntarily undertaken to be paid for, that then the jury could not find the defendant guilty of an intent to defraud.

Thirtieth. In charging the jury that it will be sufficient for them

in order to find the defendant guilty to find that his actions, even though they would have been wrongful if performed and done by a Congressman in fact, fairly and apparently pertained and related to the acts of a member of Congress.

Thirty-first. In submitting to the jury the question as to whether or not the acts of the defendant came within the province of a person taking upon himself to act as an officer acting under the authority of the United States without defining what acts came within the province of an officer acting under the authority of the United States.

Thirty-second. In refusing to charge the jury that they could not convict the defendant unless they found from the evidence that the offense was committed within the territorial jurisdiction of the United States District Court for the Southern District of New York.

Thirty-third. In denying the defendant's motion to set
139 aside the verdict of the jury rendered against him, which motion presented to the trial court was as follows: That the verdict was contrary to the evidence, contrary to the law and contrary to the charge of the Court.

Thirty-fourth. In denying the defendant's motion for an arrest of judgment upon all the grounds hereinbefore set forth.

Thirty-fifth. In overruling the demurrer to the indictment and thereby deprived the defendant of his right under the Sixth Article of the Amendments to the Constitution of the United States "to be informed of the nature and cause of the accusation."

Thirty-sixth. In denying the defendant's motion for the direction of a verdict made at the close of the whole case and thereby violated the defendant's right under the Sixth Article of the Amendments to the Constitution of the United States "to be informed of the nature and cause of the accusation."

Thirty-seventh. In denying the defendant's motion in arrest of judgment and thereby deprived the defendant of his right under the Sixth Article of the Amendments to the Constitution of the United States "to be informed of the nature and cause of the accusation."

Thirty-eighth. In submitting to the jury the question of whether a member of the House of Representatives of the Congress of the United States, as described and defined in the Constitution of the United States is an officer of the United States.

Twenty-ninth. In submitting to the jury the question of whether a member of the House of Representatives of the Congress of the United States, as described and defined in the Constitution of the United States is an officer acting under the authority of the
140 United States.

Fortieth. In denying the defendant's motion for the direction of a verdict of not guilty and thereby violated the defendant's right under the Sixth Article of the Amendments to the Constitution of the United States to a trial in the "district wherein the crime shall have been committed."

Firty-first. In denying defendant's motion in arrest of judgment and thereby violated the defendant's right under the Sixth Article of the Amendments to the Constitution of the United States

to a trial in the "district wherein the crime shall have been committed."

Forty-second. In holding and deciding that a member of the House of Representatives of the Congress of the United States is an officer of the United States or of the Government of the United States within the meaning of Article 1 of the Constitution of the United States.

Forty-third. The Court erred in divers other matters manifest upon the face of the record.

Wherefore, the said David Lamar, plaintiff-in-error, prays that the said judgment herein for the errors aforesaid and for the errors in the record and proceedings herein may be reversed and altogether held for nothing, and that his trial should go for naught and that the said plaintiff-in-error may be restored to all things which he has lost by reason of said judgment, and for such other and further relief as to the court may seem proper.

Dated, January 25th, 1915.

CARL E. WHITNEY,
Attorney for David Lamar, Plaintiff-in-Error.

Office & P. O. Address, 15 William St., Borough of Manhattan, New York City, N. Y.

141 "E."

By the Honorable —— ——, one of the Judges of the District Court of the United States for the Southern District of New York.

To the United States of America, defendant-in-error, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the City of Washington, D. C., within thirty days from the date hereof pursuant to a Writ of Error filed in the office of the Clerk of the United States District Court for the Southern District of New York, wherein David Lamar is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why the order and judgment in said Writ mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan in the City of New York, N. Y. in said District, this 25th day of January in the year of our Lord one thousand nine hundred and fifteen and of the independence of the United States the one hundred and thirty-ninth.

AUGUSTUS N. HAND,
Judge of the District Court of the United States for the Southern District of New York.

142 "F."

Supreme Court of the United States, October Term, 1914.

No. 929.

DAVID LAMAR, Plaintiff-in-Error,
vs.
THE UNITED STATES.

In Error to the District Court of the United States for the Southern District of New York.

1915, February 23, Order extending time for filing transcript of record filed.
" March 13. Order extending time for filing transcript of record filed.
" April 16. Record received and filed.
" April 16. Appearance of Carl E. Whitney for the Plaintiff in error filed.

143 Supreme Court of the United States.

I, James D. Maher, Clerk of the Supreme Court of the United States, do hereby certify that the foregoing typewritten page contains a true copy of the docket entries in the case of David Lamar, Plaintiff-in-Error, vs. The United States, No. 929, October Term, 1914, as the same remains upon the records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Washington, this 29th day of April, A. D. 1915.

(Sgd.) JAMES D. MAHER,
[SEAL.] *Clerk of the Supreme Court of the United States.*

144 (Endorsed:) "A" Suit No. —. U. S. Circuit Court of Appeals for the Second Circuit. David Lamar, Plaintiff in Error, vs. United States, Defendant in Error. Affidavit and Notice of Motion to Dismiss Writ of Error. H. Snowden Marshall, United States Attorney, Attorney for United States, Def't in Error. Due service of a copy of the within is hereby admitted. Dated New York, September 20, 1915. Carl E. Whitney, Attorney for Plaintiff in Error. To Carl E. Whitney, Esq., Attorney for Plaintiff in Error, 15 William Street, New York, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 5, 1915. William Parkin, Clerk.

145 United States Circuit Court of Appeals for the Second Circuit, October Term, 1915.

No. 59.

Motion Argued October 4, 1915; Decided October 5, 1915.

DAVID LAMAR, Plaintiff-in-Error,
vs.
UNITED STATES, Defendant-in-Error.

In Error to the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe, and War[illegible], Circuit Judges.

Motion to Dismiss Writ of Error.

If the appeal to the Supreme Court be discontinued this motion will be denied. If plaintiff in error elects to prosecute it, this motion will be granted. Plaintiff in error may have ten days in which to make his election.

146 United States Circuit Court of Appeals, Second Circuit.

DAVID LAMAR, Plaintiff in Error,
against
UNITED STATES OF AMERICA, Defendant in Error.

Motion for a certificate to the United States Supreme Court for instruction on a question of jurisdiction.

Returnable at a stated term for motions on October 11, 1915, at the opening of court.

Notice of motion served October 8th, 1915.

Note of issue filed by plaintiff in error.

Carl E. Whitney, Attorney for Plaintiff in Error, for the motion. 11 William St., Borough of Manhattan, City of New York.

H. Snowden Marshall, Esq., United States Attorney, Opposed.

Endorsed: Lamar v. U. S. Note of issue. United States Circuit Court of Appeals Second Circuit. Filed Oct. 9, 1915. William Parkin, Clerk.

147 United States Circuit Court of Appeals for the Second Circuit, October Term, 1915.

No. 59.

Motion Argued October 11, 1915; Decided October 13, 1915.

DAVID LAMAR, Plaintiff-in-Error,
vs.
UNITED STATES OF AMERICA, Defendant in Error.

In Error to the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe, and Rogers, Circuit Judges.

Motion to Certify Questions to Supreme Court.

Plaintiff in Error was indicted and convicted of having falsely assumed or pretended to be an officer or employee acting under the authority of the United States, under Section 32 of the Federal Penal Code. He sued out a writ of error which is on the present calendar as number 59 but has not yet been reached for argument.

Asserting that "there is presented in the case the question: "Is a congressman an officer?" plaintiff in error asks that this court, under Section 293 of the Judicial Code, furnish to the Supreme Court a certificate requiring instructions.

148 First. Whether the indictment states a crime under any law of the United States.

Second. Whether the acts put in issue, as shown by the Judge's charge, constitute a crime under any law of the United States.

Per CURIAM:

Until the writ of error shall have been argued, we cannot truthfully certify that this court desires the instructions of the Supreme Court, touching the question proposed, for the proper decision of the appeal. After argument it may appear that all three judges agree in their answers to these questions. In that event, it would be improper for us to thrust it upon the consideration of the Supreme Court; we should render our decision leaving it to that court to determine whether it will by certiorari, take up the subject for its own disposition thereof. After argument it may also develop that there has been error of some sort committed on the trial—in admission or rejection of evidence, in charging the jury, or what not—in which events we would reverse the judgment for such error and the questions now presented would become academic.

The motion is denied.

149 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Court-rooms in the Post-Office Building, City of New York, on the 23rd Day of October, 1915.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

DAVID LAMAR, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

A motion having been made herein by counsel for the Plaintiff in Error for a certificate to the Supreme Court of the United States;
Upon consideration thereof it is ordered that said motion be and hereby is denied.
E. H. L.

Endorsed: United States Circuit Court of Appeals, Second Circuit. David Lamar v. U. S. Order. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 23, 1915. William Parkin, Clerk.

150 United States Circuit Court of Appeals, Second Circuit.

DAVID LAMAR
v.
UNITED STATES.

Oct. 26, 1915.

Motion to modify decision requiring plaintiff in error to elect is denied.

Endorsed: Lamar v. U. S. Memo. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 26, 1915. William Parkin, Clerk.

151 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Court-rooms in the Post-Office Building, City of New York, on the 29th Day of October, 1915.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

DAVID LAMAR, Plaintiff in Error,
v.
THE UNITED STATES, Defendant in Error.

A motion having been made by counsel for the defendant in error to dismiss the writ of error herein upon the ground that another writ

of error to review the same judgment is pending in the Supreme Court of the United States;

And the court having given the plaintiff in error twenty days from the 5th day of October, 1915, in which to elect whether said writ of error pending in the Supreme Court be discontinued, in which event this motion is to be denied;

And no election having been filed within the time limited by the court;

Upon consideration thereof it is

152 Ordered that the writ of error herein be and hereby is dismissed.

Further ordered that a mandate issue accordingly.

E. H. L.
A. C. C.
H. G. W.

Endorsed: United States Circuit Court of Appeals, Second Circuit. David Lamar v. U. S. Order. United States Circuit Court of Appeals, Second Circuit. Filed Oct. 29, 1915. William Parkin, Clerk.

153 United States Circuit Court of Appeals, Second Circuit.

DAVID LAMAR, Plaintiff in Error,
v.
THE UNITED STATES, Defendant in Error.

Plaintiff in Error's Note of Issue.

Motion to restore writ of error.
Noticed for February 7th, 1916.
Not on previous calendar.
Carl E. Whitney, attorney for plaintiff in error, for the motion.
H. Snowden Marshall, United States Attorney, Southern District of New York, in opposition to motion.

Endorsed: Lamar v. U. S. Note of issue. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 3, 1916. William Parkin, Clerk.

154 United States Circuit Court of Appeals for the Second Circuit.

DAVID LAMAR, Plaintiff-in-Error, Defendant Below,
against
UNITED STATES, Defendant-in-Error, Plaintiff Below.

COUNTY OF NEW YORK,
Southern District of New York, ss:

Harold Harper, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York, and has had charge of the proceedings in this cause.

On the 3rd day of December, 1914, the defendant above named was duly convicted in the United States District Court for the Southern District of New York of falsely impersonating an officer of the Government of the United States with intent to defraud in violation of § 32 of the United States Crimical Code, and was duly sentenced to serve two years at the United States Penitentiary at Atlanta, Georgia.

Thereafter and on the 26th day of January, 1915, a writ of error from the Supreme Court of the United States was allowed by the Honorable Augustus N. Hand, United States District Judge, and the record was duly docketed in the United States Supreme Court on the 23rd day of February, 1915. As appears from the petition
155 upon which said writ of error was issued, the said writ was sought and allowed upon the ground that the jurisdiction of the Court below was in issue, and also upon the ground that the decision of the Court below involved the construction and application of the Constitution of the United States.

Thereafter, on May 21, 1915, two weeks prior to the expiration of the time limited for taking an appeal to this Court, and while the said writ of error was pending undetermined in the Supreme Court of the United States, a writ of error was obtained from the Circuit Court of Appeals to the United States District Court for the Southern District of New York, to review the same judgment of conviction, and the record was also docketed in this Court. On October 4, 1915, the defendant-in-error duly moved to dismiss the writ of error obtained from this Court upon the ground that there was a prior and inconsistent writ of error remaining undetermined in the Supreme Court, and that the defendant was not entitled to two appeals. Upon this motion this Court, on October 5, 1915, decided that if the plaintiff-in-error should discontinue his appeal to the Supreme Court, the motion should be denied, but that if he should elect to prosecute it, the motion should be granted, and plaintiff-in-error was given ten days in which to make his election. A copy of the memorandum decision of this Court is hereto annexed and marked "Exhibit A" and made part hereof. On October 11, 1915, the plaintiff-in-error moved this Court to certify to the Supreme Court in advance of the argument of the cause in this Court the following questions: First, whether the indictment states a crime under any law of the
156 United States; second, whether the acts put in issue as shown by the Judge's charge constitute a crime under any law of the United States. The plaintiff-in-error also asked for an extension of ten days' time wherein to make his election as aforesaid, which was granted. On October 14, 1915, this Court handed down a decision declining to certify the questions mentioned to the Supreme Court in advance of the argument in this Court. A copy of the per curiam opinion is hereto annexed as "Exhibit B" and made part hereof.

Thereafter the plaintiff-in-error moved to modify the decision of this Court upon the motion to dismiss so that it should permit him to maintain his appeal in this Court provided he should withdraw from the consideration of the Supreme Court so much of the assignments of error as should relate to questions other than the question whether

the Court below had jurisdiction. On October 26, 1915, said motion was duly denied. On October 29, 1915, the plaintiff-in-error not having withdrawn his writ of error from the Supreme Court or given any notice of election to [illegible], this Court ordered the issuance of its mandate on October 29, 1915, and its mandate was thereupon issued to the United States District Court, and an order of the District Court in obedience thereto dismissing the said writ was filed on November 9, 1915. A copy of the order for mandate is annexed hereto as "Exhibit C" and made part hereof.

Upon the argument of each of the foregoing motions, the attitude of the defendant-in-error was as expressed in its brief upon the motion to dismiss as follows (page 4): "The Government of course does not concede the right of the plaintiff-in-error to a review in the
157 Supreme Court upon either of the grounds assigned (jurisdictional and Constitutional)."

Thereafter the defendant-in-error duly moved the Supreme Court to dismiss the writ of error pending therein or to affirm the judgment. On January 31, 1916, the Supreme Court in an opinion delivered by Mr. Justice Holmes, directed the dismissal of the said writ of error. Upon said dismissal the Court examined certain of the principal contentions made by the plaintiff-in-error herein and held them frivolous. At least one of these objections, to wit, that the offense was not shown to have been committed within the Southern District of New York, involved an examination of the testimony at length. A copy of the said opinion is hereto annexed as "Exhibit D" and made part hereof.

Prior to the conviction of the plaintiff-in-error as aforesaid, certain proceedings were had in the District of Columbia for the purpose of removing the defendant to the Southern District of New York for pleading and trial. These proceedings were contested by the defendant and the decision of the Commissioner was reviewed upon habeas corpus and sustained by the Supreme Court of the District of Columbia, the late Mr. Justice Clabaugh presiding. The decision of Mr. Justice Clabaugh was affirmed by the Court of Appeals of the District of Columbia, and an appeal to the Supreme Court of the United States was dismissed.

In the litigation in the Courts of the District of Columbia, questions other than those now disposed of by the Supreme Court
158 as frivolous were considered and decided adversely to the contentions of the plaintiff-in-error so that practically all questions in the case have now been passed upon by an appellate tribunal. The opinion of the Court of Appeals is reported at 42 Appeals D. C. 300. A copy of said opinion is hereto annexed as "Exhibit E" and made part hereof.

(Sgd.) HAROLD HARPER.

Sworn to before me this 7th day of February, 1916.

(Sgd.) S. H. RICHARDS,

[SEAL.] *Notary Public, New York County,* 3296.

159 EXHIBIT A.

Memorandum Decision.

Circuit Court of Appeals, October 5, 1915.

LAMAR
v.
U. S.

"If the appeal to the Supreme Court be discontinued this motion will be denied. If plaintiff in error elects to prosecute it, this motion will be granted. Plaintiff in error may have ten days in which to make his election."

160 EXHIBIT B.

United States Circuit Court of Appeals, Second Circuit.

Before Lacombe, Coxe, and Rogers, Circuit Judges.

DAVID LAMAR, Plaintiff-in-Error,
v.
UNITED STATES OF AMERICA, Defendant-in-Error.

Plaintiff in Error was indicted and convicted of having falsely assumed or pretended to be an officer or employee acting under the authority of the United States, under Section 32 of the Federal Penal Code. He sued out a writ of error which is on the present calendar as number 59 but has not yet been reached for argument.

Asserting that "there is presented in the case the question: "Is a congressman an officer?" plaintiff in error asks that this court, under Section 293 of the Judicial Code, furnish to the Supreme Court a certificate requiring instructions.

First. Whether the indictment states a crime under any law of the United States.

161 Second. Whether the acts put in issue, as shown by the Judge's charge, constitute a crime under any law of the United States.

Per CURIAM:

Until the writ of error shall have been argued, we cannot truthfully certify that this court desires the instructions of the Supreme Court, touching the questions proposed, for the proper decision of the appeal. After argument it may appear that all three judges agree in their answers to these questions. In that event, it would be improper for us to thrust it upon the consideration of the Supreme Court; we should render our decision leaving it to that Court to determine whether it will by certiorari, take up the subject for

its own disposition thereof. After argument it may also develop that there has been error of some sort committed on the trial, in admission or rejection of evidence, in charging the jury, or what not,—in which event we would reverse the judgment for such error and the questions now presented would become academic.

The motion is denied.

162 EXHIBIT C.

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Court-Rooms in the Post-Office Building, City of New York, on the 29th Day of October, 1915.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

DAVID LAMAR, Plaintiff-in-Error,
vs.
THE UNITED STATES, Defendant-in-Error.

A motion having been made by counsel for the defendant in error to dismiss the writ of error herein upon the ground that another writ of error to review the same judgment is pending in the Supreme Court of the United States;

And the court having given the plaintiff in error twenty days from the 5th day of October, 1915, in which to elect whether said writ of error pending in the Supreme Court be discontinued, in which event this motion is to be denied;

And no election having been filed within the time limited by the court;

Upon consideration thereof it is

163 Ordered that the writ of error herein be and hereby is dismissed.

Further ordered that a mandate issue accordingly.

E. H. L.
A. C. C.
H. G. W.

164 EXHIBIT D.

Supreme Court of the United States, October Term, 1915.

No. 434.

DAVID LAMAR, Plaintiff in Error,
vs.
THE UNITED STATES.

In Error to the District Court of the United States for the Southern District of New York.

(January 31, 1916.)

Mr. Justice HOLMES delivered the opinion of the Court:

The plaintiff in error was tried and convicted upon an indictment charging him with having falsely pretended to be an officer of the Government of the United States, to wit, a member of the House of Representatives, that is to say, A. Mitchell Palmer, a member of Congress, with intent to defraud J. P. Morgan & Company and the United States Steel Corporation. The case is brought here directly on the ground that the Court had no jurisdiction because the indictment does not charge a crime against the United States, and that the interpretation of the Constitution was involved in the decision that a Congressman is an officer of the United States. There are subsidiary objections stated as constitutional that the indictment is insufficient and that it does not appear in what district the crime was committed.

On the matter of jurisdiction it is said that when the controversy concerns a subject limited by Federal law, such as bank-
165 ruptcy, Frederick L. Grant Shoe Co. v. W. M. Laird Co., 212 U. S. 445; copyright, Globe Newspaper Co. v. Walker, 210 U. S. 356; patents, Healy v. Sea Gull Specialty Co., 237 U. S. 479, or admiralty. The Jefferson, 215 U. S. 130, the jurisdiction so far coalesces with the merits that a case not within the law is not within the jurisdiction of the Court. The Ira M. Hedges, 218 U. S. 264, 270. Haddock v. Haddock, 201 U. S. 562. Jurisdiction is a matter of power and covers wrong as well as right decisions. Fauntleroy v. Lum, 210 U. S. 230, 234, 235. Burnet v. Desmornes, 226 U. S. 145, 147. There may be instances in which it is hard to say whether a law goes to the power or only to the duty of the Court; but the argument is pressed too far. A decision that a patent is bad, either on the facts or on the law, is as binding as one that it is good. The Fair v. Kohler Die Co., 228 U. S. 22, 25. And nothing can be clearer than that the District Court, which has jurisdiction of all crimes cognizable under the authority of the United States, (Judicial Code of March 3, 1911, c. 231, §24, second), acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong.

The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.

As to the construction of the Constitution being involved, it obviously is not. The question is in what sense the word "officer" is used in the Criminal Code of March 4, 1909, c. 321, § 32. The same words may have different meanings in different parts of the same act and of course words may be used in a statute in a different sense from that in which they are used in the Constitution. American Security & Trust Co. v. District of Columbia, 224 U. S. 491, 494.

166

There were fainter suggestions that the defendant's constitutional rights were infringed because the nature of the fraud intended was not set forth and because the State and district wherein the crime was committed were not proved. The indictment is not for defrauding but for personation with intent to defraud; the nature of the fraud intended is not material and even might not yet have been determined. It is not an indictment for a conspiracy to commit an offense against the United States, where the offence intended must be shown to be a substantive crime. It reasonably may be inferred from the evidence that the defendant was tried in the right State and district in fact. If so, his constitutional rights were preserved. The personation was by telephone to a person in New York (Southern District) and it might be found that the speaker also was in the Southern District; but if not, at all events the personation took effect there. Burton v. United States, 202 U. S. 344, 389. These objections are frivolous and the others have been shown to be unfounded. It follows that the writ of error must be dismissed.

Writ of error dismissed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

[Seal of the Sup. Ct. of U. S.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

167

EXHIBIT E.

In the Court of Appeals of the District of Columbia.

No. 2628.

DAVID LAMAR, Appellant,
vs.
MAURICE SPLAIN, United States Marshal, and ANSON S. TAYLOR, United States Commissioner.

This is an appeal from an order of the Supreme Court of the District discharging a writ of habeas corpus.

An indictment returned to the District Court of the United States for the Southern District of New York, in four counts, charged David Lamar with falsely assuming to be an officer of the United

States with the intent to defraud certain persons in the State of New York.

The first count charges that the defendant did falsely assume and pretend to be an officer acting under the authority of the United States, to wit, a member of the House of Representatives of the Congress of the United States, that is to say, A. Mitchell Palmer, a member of Congress representing the twenty-sixth Congressional District of the State of Pennsylvania, with the intent, then and there, to defraud (certain named persons).

Other counts charged the same offense in varying forms. A capias issued thereon to the Marshal of the Southern District of New York was returned that the defendant could not be found.

The defendant was afterwards arrested in the District of Columbia, and brought before Anson S. Taylor, United States Com-
168 missioner, to whom certified copies of the indictment and the process thereon were submitted.

On September 24, 1913, the Commissioner held the defendant to bail in the sum of $3,000.00 for his appearance before the said United States District Court of the Southern District of New York on the first day of the term thereof to be held October 7, 1913. A recognizance in the ordinary form, with a surety, was entered into and the defendant was discharged from custody upon the same.

October 4, 1913, the Surety offered to surrender the defendant to said Commissioner, who accepted the same, and committed the defendant to the custody of the Marshal of the District.

Defendant then sued out a writ of habeas corpus from the Chief Justice of the Supreme Court of the District; his petition alleging that the indictment charged him with no offence, and that there was no evidence tending to show that he was probably guilty of the offense, if any, with which he is supposed to be charged. Return was made to the writ by Aulick Palmer, then Marshal, setting out the commitment and a copy of the proceedings before the Commissioner. Upon the petition and exhibits, and the return of the Marshal, defendant moved his discharge from custody, notwithstanding said proceedings.

October 22, 1913, the Court denied the motion, and the petition, discharged the writ, and remanded the defendant to the custody of the Marshal.

169 Defendant has appealed from the order, assigning nineteen grounds of error. Marshal Palmer, having retired from office since the lodgment of the appeal, his successor, Maurice Splain, has been substituted as a party in his stead.

The argument has taken a wider range than it is important to follow.

It would seem that when the recognizance was entered into before the Commissioner the duty of the latter ended; and that subsequent proceedings for the surrender of the prisoner by his surety should have been before the Court having jurisdiction of the offense.

Whether so or not, the question is immaterial. The action having been taken in the interest of the petitioner, he is in no condition to question its irregularity.

In the original proceeding before the Commissioner, the copy of the indictment and writ, and the admission of the identity of the prisoner, constituted a prima facie case for removal. Haas vs. Henkel, 216 U. S. 462, 481; Price vs. Henkel, Id. 488, 492.

No evidence of any nature was offered by the prisoner.

The single question for determination is this: Does the indictment charge an offence against the laws of the United States?

In this consideration: "The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as
170 a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the State from which he has fled." Pierce vs. Creecy, 210 U. S. 387, 402, and cases there cited. Strassheim vs. Daily, 221 U. S. 280, 282. The foregoing were extradition cases on demand of a State; but the rule applies in proceedings for removal to a United States Court in another jurisdiction. Haas vs. Henkel, 216 U. S. 462, 481.

One good count in an indictment under which a trial may be had in the district to which removal is sought, is enough to support an order for removal. Price vs. Henkel 216 U. S. 488, 490. For this reason objections to other counts than the first will not be considered. If the first count, before recited, substantially charges an offence against the United States, the others will be for the exclusive determination of the Court in which the indictment was returned.

The charge in the indictment is that defined in Section 32, Chap. 4 of the Criminal Code of the United States, reading as follows:

"Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any Department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars or imprisoned not more than three years, or both."

In a case cited on behalf of the appellant it is declared that this Section includes two separate offences; the first, falsely impersonating an officer or employee of the United States and acting as
171 such with intent to defraud; the second, falsely impersonating an officer or employee of the United States and in the assumed character demanding or obtaining some valuable thing with intent to defraud. U. S. vs. Taylor, 108 Fed. Rep. 621.

This indictment purports to charge the first of those offences.

The contention is that there is no offence charged because a member of the House of Representatives is not an officer of the United States. If this contention be sound the indictment is bad in substance. We have found no case in which the point has been determined.

Office, in the common use and meaning of the word, is a public charge or position that may be held in the Federal, a State, or municipal government, and is executive, judicial, or legislative in character.

91

A member of the House of Representatives in the Congress of the United States is elected by the voters of his State in a designated district to hold a position of honor and trust created by the Constitution of the United States as a branch of the National Legislative Department. As such he is an officer of the United States in the general sense. We do not regard the case of Burton vs. U. S., 202 U. S., 344, 369, as opposed to this view.

Burton, a member of the Senate of the United States, had been convicted of a crime. The Judgment convicting him proceeded to recite, in the terms of Section 1782 R. S. that he "is rendered forever
172 hereafter incapable of holding any office of honor, trust or profit under the government of the United States." It was said that the words might well have been omitted from the judgment.

"By its own force, without the aid of such words in the judgment, the Statute makes one convicted under it incapable forever thereafter of holding any office of honor, trust or profit under the government of the United States. But the final judgment of conviction did not operate, ipso facto, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment. The seat into which he was originally inducted as a Senator from Kansas could only become vacant by his death, or by the expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its Constitutional powers."

This is necessarily so because the Constitution provides that each house shall be the judge of the elections, returns, and qualifications of its own members. Art. I, Sec. 5. The Court proceeded then to use the language relied on by the appellant: "This must be so for the further reason that the declaration in Section 1782, that any one convicted under its provisions shall be incapable of holding any office of honor, trust, or profit 'under the Government of the United States' refers only to offices created by or existing under the direct authority of the National Government as organized under the Constitution, and not to officers, the appointments to which are made by the States, acting separately, albeit proceeding, in respect of such appoint-
173 ments, under the sanction of that instrument. While the Senate, as a branch of the Legislative Department, owes its existence to the Constitution, and participates in passing laws that concern the entire country, its members are chosen by the State legislatures, and can not properly be said to hold their places under the Government of the United States."

What is here held is that offices "under the Government of the United States" are those appointed in the manner provided in the Constitution. It falls far short of holding that a member of Congress, though not holding an office under the Government of the United States, is not an officer of that Government. His office is not created by the government organized under the Constitution, but is an integral part of that government.

Section 32 punishes one who falsely assumes or pretends to be an officer of the United States, and its object would seem to apply equally as well to a legislative officer of the United States as to one

holding an office under the Government thereof. Be that as it may it is not plain that it does not apply, and for that reason its interpretation is peculiarly the province of the Court in which the indictment was presented.

We find no error in the judgment and it is affirmed with costs.

Affirmed.

(Signed) SETH SHEPARD.
Chief Justice.

174 (Endorsed:) 5445. U. S. Circuit Court of Appeals for the Second Circuit. David Lamar, Plaintiff-in-Error, Defendant below, vs. United States, Defendant-in-Error, Plaintiff below. Affidavit in opposition to motion to reinstate. H. Snowden Marshall, United States Attorney, Attorney for United States. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 11, 1916. William Parkin, clerk.

175 United States Circuit Court of Appeals for the Second Circuit.

DAVID LAMAR, Plaintiff in Error (Defendant Below),
against
UNITED STATES OF AMERICA, Defendant in Error (Plaintiff Below),

Before Coxe, Ward, and Rogers, Circuit Judges.

Per CURIAM:

The defendant deliberately and with full knowledge elected to proceed in the Supreme Court, which court dismissed his writ. His writ from this court was, on October 15th, 1915, dismissed. It is too late now to grant the relief asked for.

The motion is denied.

Endorsed: United States Circuit Court of Appeals, Second Circuit. David Lamar against United States of America. Memorandum. Per Curiam. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 11, 1916. William Parkin, Clerk.

176 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Court-rooms in the Post-Office Building, City of New York, on the 21st Day of February 1916.

Present: Hon. Alfred C. Coxe, Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges.

DAVID LAMAR, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

A motion having been made herein by counsel for the Plaintiff in Error to reinstate the writ of error herein dismissed by this court on the 29th day of October, 1915;

Upon consideration thereof it is
Ordered that said motion be and hereby is denied.
A. C. C.

Endorsed: United States Circuit Court of Appeals, Second Circuit. David Lamar v. United States. Order. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 23, 1916. William Parkin, Clerk.

177 United States Circuit Court of Appeals, Second Circuit.

DAVID LAMAR, Plaintiff in Error,
v.
THE UNITED STATES.

Upon reading and filing the annexed consents, it is hereby
Ordered that Walmsley & Kohlman be and they hereby are substituted as attorneys for the plaintiff in error in the above entitled cause in the place and stead of Carl E. Whitney.
Dated New York March 2nd, 1916.

ALFRED C. COXE, *U. S. J.*

United States Circuit Court of Appeals, Second Circuit.

DAVID LAMAR, Plaintiff in Error,
v.
THE UNITED STATES,

It is hereby consented that Hardie B. Walmsley be substituted as attorney for the plaintiff in error in the above entitled matter in the place and stead of Carl E. Whitney.
Dated New York February 26th, 1916.

CARL E. WHITNEY,
Attorney for Plaintiff in Error.
D. LAMAR,
Plaintiff in Error.

178 STATE OF NEW YORK,
Southern District of New York, ss:

On this 26th day of February 1916, before me personally appeared David Lamar to me known and known to me to be the individual, described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.
[SEAL.] M. C. SCHAEFFER,
Notary Public, Kings County, No. 191.

Kings Co. Register's No. 6176. Certificate filed in N. Y. Co., No. 247. New York Co. Register's No. 6429. Commission expires Mar. 30, 1916.

United States Circuit Court of Appeals, Second Circuit.

DAVID LAMAR, Plaintiff in Error,
v.
THE UNITED STATES.

It is hereby consented that Walmsley & Kohlman be substituted as attorneys for the plaintiff in error in the above entitled matter in the place and stead of Carl E. Whitney.

Dated New York, March 1st, 1916.

HARDIE B. WALMSLEY,
Attorneys for Plaintiff in Error.
DAVID LAMAR,
Plaintiff in Error.

STATE OF NEW YORK,
Southern District of New York, ss:

On this 1st day of March 1916, before me personally ap-
179 peared David Lamar, to me known and known to me to be *the* of the individuals described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[SEAL.]

M. C. SCHAEFFER,
Notary Public, Kings Co., No. 191.

Kings Co. Register's No. 6176. Certificate filed in New York Co., No. 247. New York Co. Register's No. 6429. Commission expires March 30, 1916.

Endorsed: United States Circuit Court of Appeals, Second Circuit. David Lamar, Plaintiff in error, vs. The United States. Original order of substitution and consent. Walmsley & Kohlman, attorneys for plaintiff in error, 61 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 2, 1916. William Parkin, Clerk.

180 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 176 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of David Lamar, Plaintiff in Error, against United States, Defendant in Error, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 2d day of March in the year of our Lord One Thousand Nine Hundred and Sixteen

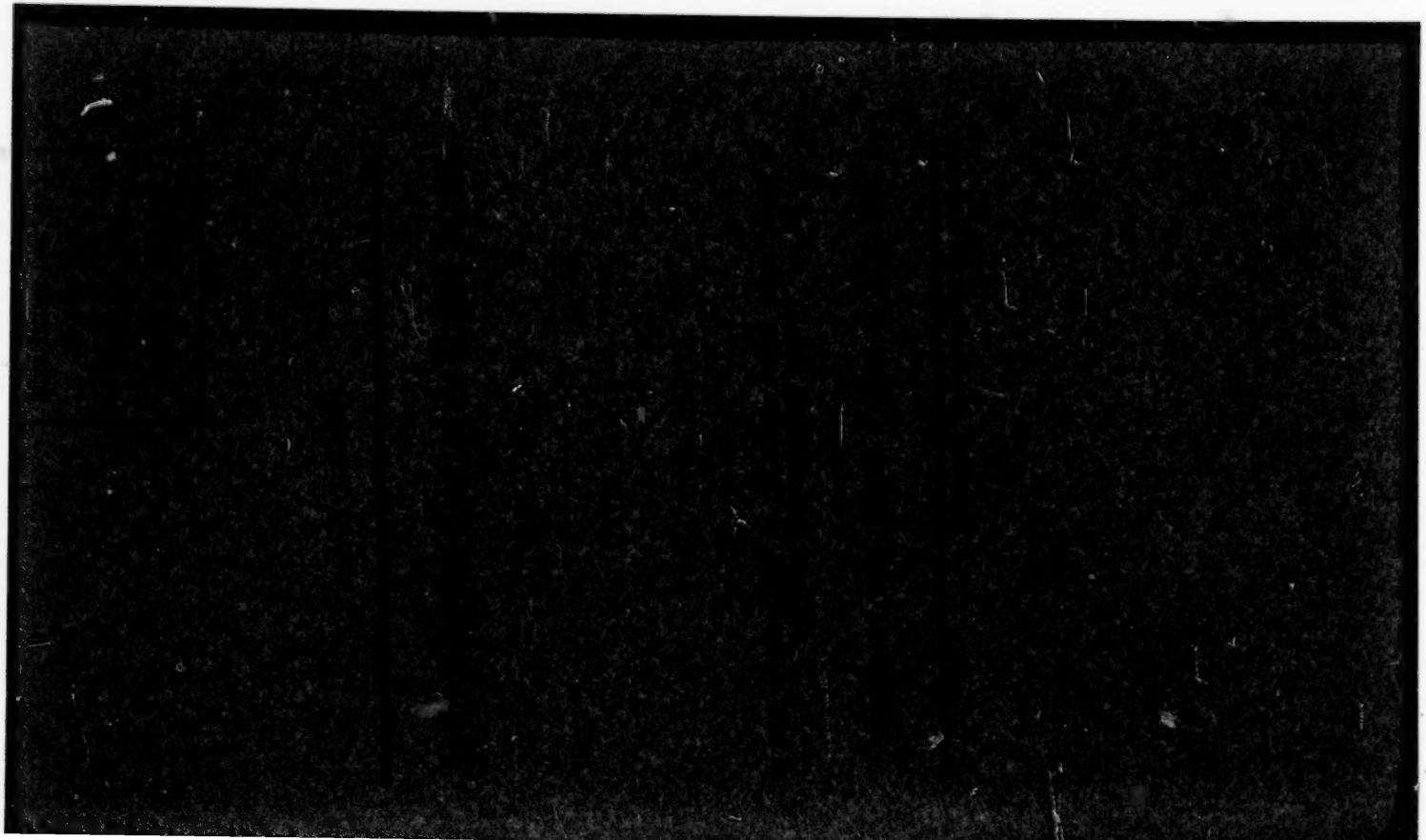
and of the Independence of the said United States the One Hundred fortieth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WILLIAM PARKIN, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled.]

Endorsed on cover: File No. 25,178. U. S. Circuit Court Appeals, 2d Circuit. Term No. 895. David Lamar vs. The United States. Writ of certiorari and return. Filed March 13th, 1916. File No. 25,178.



In the Supreme Court of the United States.

OCTOBER TERM, 1915.

DAVID LAMAR
v.
THE UNITED STATES. } No. ——.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court during the present term.

On December 3, 1914, Lamar was convicted in the District Court of the United States for the Southern District of New York for falsely assuming and pretending to be an officer of the Government of the United States, to wit, a Member of the House of Representatives, with intent to defraud certain citizens named in the indictment, in violation of section 32 of the Criminal Code, and sentenced to imprisonment in the United States Penitentiary at Atlanta, Ga., for a term of two years.

31206—16

Thereafter Lamar sued out a writ of error from the Circuit Court of Appeals for the Second Circuit, also a writ of error direct from this court on the ground that substantial constitutional questions were involved, and he was enlarged on bail. The writ of error from the Circuit Court of Appeals was dismissed because of the pendency of the writ of error from this court, and the latter writ was dismissed January 31, 1916, on the ground *inter alia* that the construction of the Constitution was not involved. Thereupon Lamar filed a motion in the Circuit Court of Appeals to reinstate the writ of error which had been dismissed by that court, which motion was denied. A motion was then submitted to this court for leave to file a petition for a writ of mandamus to compel the Circuit Court of Appeals to reinstate the writ of error from that court. That motion was denied, but this court of its own motion granted a writ of certiorari to said Circuit Court of Appeals.

Lamar is still at large on bail.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1916.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.
No. 895

DAVID LAMAR

against

THE UNITED STATES.

AFFIDAVIT ON APPLICATION TO ADVANCE.

HARDIE B. WALMSLEY,
FRANCIS L. KOHLMAN,
Attorneys for DAVID LAMAR.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

IN THE

Supreme Court of the United States.

DAVID LAMAR, AGAINST UNITED STATES OF AMERICA.	October Term, 1915 No.

STATE OF NEW YORK,
County of New York,
Southern District of New York.

HARDIE B. WALMSLEY and FRANCIS L. KOHLMAN, being duly severally sworn each for himself, deposes and says as follows: We are attorneys and Counsellors at Law, duly admitted to practice in the Supreme Court of the United States.

We do not oppose the application made by the Attorney General to advance for hearing the above entitled cause at such time during the present term as this Court may fix and direct. We respectfully submit to this Honorable Court the following considerations:

We were retained by David Lamar on February 18th, 1916, and an order of substitution was entered in the United States Circuit Court of Appeals for the Second Circuit on March 2nd, 1916. From February 18th, 1916, to February 29th, 1916, we were

engaged almost constantly in conferences with the said Lamar and various counsel who had theretofore been associated in the case, and the preparation of papers contemplating certain proposed applications to this Court. The directions of this Court on February 28th, 1916, by which a writ of *certiorari* was issued on its own motion rendered such contemplated applications unnecessary. The return upon the said writ by the Circuit Court of Appeals, as we are informed and believe, was filed in this Court on March 10th, 1916. We are new counsel fresh in the case, and have not had sufficient time or opportunity to study in a satisfactory way the important and novel issue involved herein. Our preliminary investigation shows that the following propositions of law, among others, are involved:

a. Is a member of the House of Representatives of the Congress of the United States of America an officer of the said United States, or of the government thereof within the meaning of Section 32 of the Criminal Code of the United States, or of the Constitution, or any law of the United States?

b. Is the supposed Act of the Congress of the United States purporting to have been approved October 3rd, 1913, and pursuant to which Honorable Clarence W. Sessions presided over and conducted the trial of David Lamar, null, void and of no effect, as being contrary to, and in contravention of the Constitution of the United States of America?

In addition to the above, there are other questions requiring careful study and consideration. We desire sufficient time to prepare a comprehensive brief and argument.

We have pending upon the calendars of various Courts for trial within the next two months, twelve cases, and in the various Appellate Courts of the

State of New York and the United States five appeals shortly to be reached for argument, the briefs and arguments in which must be prepared.

In addition to these causes, we have pending pressing matters in the office in the nature of reorganization, general corporate work, trusteeships, and the administration of estates.

We desire to do justice to the cause pending in this Court, as well as to the other matters referred to, and therefore seek such time for the preparation of the briefs and argument herein as will in the judgment of this Honorable Court enable us to treat all of these matters concurrently.

We also desire to respectfully call the attention of this Honorable Court to the fact that this application is not made in accordance with subdivision 6 of Rule 26 of this Court, in that the motion to advance this cause has not been printed, and does not contain a statement of the matter involved, nor the reasons for the application.

We therefore respectfully ask that in the event this Court advances this cause it be set down for argument at a date which in the judgment of this Honorable Court will give us full opportunity for study and preparation of brief and argument, and respectfully suggest that such date be not earlier than October, 1916.

HARDIE B. WALMSLEY,
FRANCIS L. KOHLMAN.

Sworn to before me this
11th day of March, 1916.

MARION C. SHAEFFER,
[L. S.] Notary Public,
Kings County,
Certificate filed in New York County.

(8819U)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 895.

DAVID LAMAR

vs.

THE UNITED STATES.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

A. LEO EVERETT,
H. B. WALMSLEY,
FRANCIS L. KOHLMAN,
Of Counsel for Petitioner.

INDEX.

LIST OF AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 895.

DAVID LAMAR

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Statement of the Case.

This cause comes up on Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit. That Court dismissed on October 29th, 1915, the Writ of Error taken therefrom to the United States District Court for the Southern District of New York, the ground of such dismissal being that the plaintiff-in-error had prosecuted a direct Writ of Error from this Court, and that this constituted a prior and inconsistent Writ of Error. A Mandamus was sought in this Court to reinstate the Writ of Error in the Circuit Court of Appeals; the application

for a Mandamus was denied and, instead, this Writ of Certiorari was granted, which brings up for review the whole record in the Circuit Court of Appeals.

The petitioner was convicted December 4th, 1914, in the United States District Court for the Southern District of New York, upon an indictment found in that District under Section 32 of the Criminal Code. The Statute is as follows:

> "Section 32. Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any Department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both."

The indictment, found July 17th, 1913, was as follows (Transcript of Record pp. 3-4):

> "Southern District of New York, ss.:
>
> "The Grand Jurors of the United States of America within and for the district aforesaid, on their oaths present that David Lamar, alias David H. Lewis, defendant, late of the City and County of New York, in the district aforesaid, yeoman, heretofore, to wit, on the eighth day of February, in the year of our Lord one thousand nine hundred and thirteen, at the Southern District of New York and within the jurisdiction of this Court, unlawfully, knowingly and feloniously did falsely assume and pretend to be an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America, that is to say, A. Mitchell Palmer, a member of Congress representing the Twenty-sixth District of the State of Pennsylvania, with the intent,

then and there, to defraud Lewis Cass Ledyard, and J. Pierpont Morgan, Edward T. Stotesbury, Charles Steele, J. Pierpont Morgan, Jr., Henry P. Davison, Temple Bowdoin, Arthur E. Newbold, William Pierson Hamilton, William H. Porter, Thomas W. Lamont and Horatio G. Lloyd, who then and there composed the co-partnership of J. P. Morgan & Company, and the United States Steel Corporation, which was then and there a corporation organized and existing under the laws of the State of New Jersey, and other persons to the Grand Jurors unknown, and the said defendant, then and there, with the intent and purpose aforesaid, did take upon himself to act as such member of Congress; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 32, U. S. C. C.)

"Second Count."

"And the jurors aforesaid, on their oath aforesaid, do further present that David Lamar, alias David H. Lewis, defendant, late of the City and County of New York, in the district aforesaid, yeoman, heretofore, to wit, on the eighth day of February, in the year of our Lord one thousand nine hundred and thirteen, at the Southern District of New York, and within the jurisdiction of this Court, unlawfully, knowingly and feloniously did falsely assume and pretend to be an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America, that is to say, A. Mitchell Palmer, a member of Congress representing the Twenty-sixth District of the State of Pennsylvania, with the intent, then and there, to defraud Lewis Cass Ledyard, and J. Pierpont Morgan, Edward T. Stotesbury, Charles Steele, J. Pierpont Morgan, Jr., Henry P. Davison, Temple Bowdoin, Arthur E. Newbold, William Pierson Hamilton, William H. Porter, Thomas W. Lamont and Horatio G. Lloyd, who then and there composed the co-partnership of J. P. Morgan & Com-

pany, and the United States Steel Corporation, which was then and there a corporation organized and existing under the laws of the State of New Jersey, and other persons to the Grand Jurors unknown, and to mislead, injure and deceive them and by intentional wrongdoing and by cunning art and deception, on the part of the said defendant, to prejudice and deprive the said persons and the said corporation of their just and lawful rights and them to entrap and cheat; and to fraudulently deprive the said persons and the said corporation of divers sums of money; and the said defendant, then and there, with the intent and purpose aforesaid, did take upon himself to act as such member of Congress; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 32, U. S. C. C.)

"H. SNOWDEN MARSHALL,
"United States Attorney."

The Trial Judge heard argument upon demurrer to the indictment, which was overruled (p. 11). The counsel for the defendant then moved to quash the indictment upon all the grounds urged in the demurrer, which motion was overruled (p. 12).

Upon the conclusion of the testimony, a motion was made to instruct the jury to render a verdict of "Not Guilty," which motion was denied (p. 50). After the verdict was rendered, motions were duly made to set aside the verdict and enter an arrest of judgment, which were denied (pp. 55, 56).

The facts developed by the testimony were as follows:

The witness Lewis Cass Ledyard was called up by telephone February 4, 1913, by one describing himself as Congressman Palmer (it was admitted upon the trial that this man was the defendant Lamar), who explained that he called up Mr. Ledyard because the latter was closely associated with J. P. Morgan & Company and

others in control of the United States Steel Corporation; that the defiant attitude of the United States Steel Corporation to Congress had caused a hostile feeling on the part of the controlling elements in the Democratic party; he therefore suggested a more cordial co-operation of the United States Steel interests in the policies of the party leaders. Mr. Ledyard expressed a doubt whether the Steel Corporation had been defiant, as charged. The defendant showed himself surprised by this disavowal and promised to let Mr. Ledyard hear from him again (pp. 16-18). The next day, February 5th, he called up Mr. Ledyard and said that the attitude of the company had been so reported to the Speaker of the House by Mr. Lauterbach after an interview between Mr. Lauterbach and members of the firm of J. P. Morgan & Company. He suggested that Mr. Ledyard should get in touch with Mr. Lauterbach and verify the facts. Mr. Ledyard recalled that Mr. Lauterbach had approached Mr. Morgan but added that no credit had been attached to his mission, because it was supposed from what he said that he represented the defendant (pages 18-20).

The next day, February 6th, Mr. Lauterbach called on Mr. Ledyard at the latter's request. He related the circumstances attending his interviews with members of Mr. Morgan's firm in connection with the steel investigation in Congress two years before. At that period he had not been acting as an emissary of the Democratic leaders (pages 35-40).

The following day, February 7th, Mr. Ledyard having been called up on the telephone by the defendant (still representing himself as Congressman Palmer), reported to him the interview with Mr. Lauterbach, stating that from it he had gained the impression that Lauterbach had in his dealings with the Morgan firm acted as a repre-

sentative of the defendant Lamar and not of the Democratic leaders. The defendant expressed surprise at hearing this. He proceeded to inquire whether Mr. Ledyard's people were in a frame of mind to co-operate with the Democratic organization. Mr. Ledyard's reply was that he should come personally to see him at his office. The offer was declined by the defendant, who said he must first confer with Senator Stone and other leaders of the party (pages 21-23).

On February 8th, Mr. Ledyard was again called up by the defendant. The latter stated that it had been decided at a conference that Mr. Lauterbach's services should be retained and he would be sent to Mr. Ledyard with full instructions. He added that there was to be no question of money in the matter and that if any such suggestion were made it would be without authority and a private speculation on Mr. Lauterbach's part (pages 23-25).

Mr. Lauterbach called upon Mr. Ledyard the same day. He said he was authorized to announce several projects which the radicals in Congress had in contemplation which would affect the steel interests; that action upon them might be averted upon certain conditions, namely, that these interests should get rid of their pledges to other political parties; that they should make no campaign contributions to any political party, and that they should secure the support of certain Southern senators on behalf of the party policies; also that he, Lauterbach, should be made an intermediary in the negotiations. There was to be no money paid unless they chose to give him a reasonable fee, but he was willing to co-operate without one, believing that his employment by Messrs. J. P. Morgan & Co. and the Steel interests would be valuable to him as constituting a vindication of his character (pages 26-23 and Govt's Ex. 2, p. 34).

He consented that all this should be reduced by Mr. Ledyard to writing in his presence. As a further test of sincerity, he desired to have Speaker Clark confirm his authority to undertake the interview.

"He said 'He knows that this or some like interview is arranged for.' I said 'Would the Speaker verify that, if appealed to for verification?' He said 'He would.' I said 'If that be so, do you not think it would be only a reasonable precaution for us to take to inquire of the Speaker directly whether what you have done here is by his authority?' 'I certainly do.' He said 'I would be glad to have you do so.' " (Page 33.)

Throughout all these interviews, it was made clear that both Lamar and Lauterbach were undertaking to set forth the views of the Party, which was just then coming into power and which would have an influence in shaping legislation. There was no pretence at any time that any Governmental authority was being used.

The Questions Involved.

It will be argued that the acts alleged in the indictment did not come within the scope of Section 32 of the Criminal Code, and that the facts adduced, for the same reasons, did not constitute a crime. These contentions will be established in the following points of the brief.

Specifications of Error.

The Assignments of Error numbered "First," "Second," "Third," "Fourth," "Fifth" and "Sixth" are all comprised in substance in the Seventh Assignment of Error, as follows:

> "SEVENTH. In denying the defendant's motion made at the opening of the trial, to quash the indictment upon the following grounds:
>
> 1. That within the meaning of Section 32 of the Federal Penal Code, otherwise called the United States Criminal Code, a member of the House of Representatives of the Congress of the United States of America, is not an officer of the United States or of the Government of the United States.
>
> 2. That within the meaning of Section 32 of the Federal Penal Code, otherwise called the United States Criminal Code, a member of the House of Representatives of the Congress of the United States of America is not an officer acting under the authority of the United States.
>
> 3. That within such meaning, a member of the said House of Representatives is not an officer acting under the authority of an officer of the Government of the United States.
>
> 4. That within the meaning of the Constitution of the United States, a member of the House of Representatives of the Congress of the United States of America, is not an officer of the United States or of the Government of the United States.
>
> 5. That neither said indictment nor any count thereof charges the defendant with any offense against the United States or any law thereof.
>
> 6. That neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant assumed or pretended to be an officer acting under the authority of the United States, to wit, a member of the House of Representatives of the Con-

gress of the United States as therein undertaken to be alleged.

7. That neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant assumed or pretended to be an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America.

8. That neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant took upon himself to act as an officer of the Government of the United States, to wit, a member of the House of Representatives of the Congress of the United States of America.

9. That neither the said indictment nor any count thereof sufficiently or at all alleges in what manner, particular or respect the defendant took upon himself to act as an officer acting under the authority of the United States.

10. That the said indictment and the matters therein contained in manner and form are not sufficient in law and that the defendant is not bound under the law of the land to answer the same" (pp. 57-58).

"EIGHTEENTH. In denying the defendant's motion to dismiss the indictment herein or to instruct the jury to acquit the defendant made at the conclusion of the case as presented by the United States upon all the grounds contained in the seventh and eighth assignments of error, and upon the further ground that the indictment does not charge a crime within the jurisdiction of the Federal Courts; that upon all the facts proven the defendant is not guilty; that there is no proof that the defendant acted with intent to defraud the persons and the corporations named in the indictment; that there is no proof that defendant in committing the acts proven on the trial falsely assumed or pretended to be an officer or em-

ployee acting under the authority of the United States, or any department or any officer of the Government thereof or took upon himself to act as such; that there is no proof to show that the crime, if there was a crime, was committed in the Southern District of New York; that as a matter of law a member of the House of Representatives of the United States is not an officer of the United States within the meaning of the statute under which this prosecution is brought; that there is no evidence in the case that the defendant pretended or assumed to be a member of the House of Representatives of the Congress of the United States other than by conversation over the telephone; that as a matter of law the crime specified in Section 32 of the United States Criminal Code, and alleged in the indictment herein, of falsely assuming or pretending to be an officer of the Government of the United States and taking upon himself to act as such, is not committed where all the evidence adduced in the case shows merely conversations had and statements made by telephonic communication" (pp. 59-60).

"TWENTIETH. That the Trial Court erred in refusing to charge the jury as requested by the defendant as follows:

> 'You are instructed that upon all the testimony in the case your verdict should be not guilty'" (p. 60).

"TWENTY-FIRST. In not instructing the jury that upon all the facts appearing from the testimony there was no evidence to show that the United States District Court for the Southern District of New York had jurisdiction of the said cause, for that there was no evidence to show that the crime alleged in the indictment was committed in the said Southern District of New York" (p. 60).

"TWENTY-THIRD. That the Trial Court erred in charging the jury as follows:

> 'The defendant in this case claims that even

though he may have seemed and pretended to be Congressman Palmer, yet that he did no act in the official character of Congressman Palmer. That what he did and all that he did, was done as an individual or, at most, as one of the leaders of the then dominant political party in Congress.

The defendant contends that the facts which are established in this case do not show that he claimed or attempted to act as a Congressman in his official capacity as a Congressman.

The Government on the other hand, contends that what he did was claimed by him at that time to be in an official character, and not as an individual, and not as a mere party leader of the dominant political party; that he assumed the act in his pretended official character as a Congressman. The Government claims that one of the purposes, or the pretended purposes of his action and conduct at that time was to obtain the approval and co-operation of the firm of Morgan & Company, and of the United States Steel Corporation with relation to contemplated legislation which would affect their business interests. The Government also claims that another pretended purpose of his actions at that time was to prevent legislation which would be hostile to the business interests of the country, including the business interests of this firm and this corporation. These purposes, on the part of a real Congressman, might have been or might not have been legitimate and rightful, depending upon the conditions and circumstances. To apply the matter to the claimed facts of this case, if you find, in this case, from the evidence, that this respondent, in calling up Mr. Ledyard by telephone, in talking with him over the telephone, in sending him Mr. Lauterbach, or in procuring a meeting between Mr. Lauterbach and Mr. Ledyard, claimed or asserted, or pretended to be acting in his official character of a Congressman of the United States, and not merely as an individual, or a political leader, you will be warranted in finding against him upon this branch of the case' " (Record, pp. 55-56),

to which exception was duly noted by counsel for the defendant as follows:

> "*Mr. Davis:* If your Honor please, before the jury retires, we desire to note an exception, to that portion of your Honor's charge in which you say to the jury that if the defendant in taking upon himself to act as a Congressman claimed to be acting in such an official capacity, that would suffice to justify the jury in finding that he was so taking upon himself to act as a Congressman in his official capacity; our point being that no matter what he pretended in that behalf, whether in fact he took upon himself to act as a Congressman in his official capacity, must be determined by the jury, in accordance with what they find he actually did, and if what he actually did was not to act as a Congressman in his official capacity, he did not take upon himself to act as such, no matter what his pretense or claim was.
>
> *The Court:* The exception will be noted but the instructions to the jury were not as stated by counsel.
>
> *Mr. Davis:* Well, then, I am glad to be corrected, but out of abundant caution, as I heard it, your Honor will allow me an exception.
>
> *The Court:* The exception is noted" (pp. 60-61).

"TWENTY-SIXTH. In instructing the jury that if the said plaintiff-in-error, defendant as aforesaid, claimed or asserted, or pretended to be acting in his official character of a Congressman of the United States, and not merely as an individual or a political leader, the jury would be warranted in finding that the said plaintiff-in-error, defendant as aforesaid, took upon himself to act as an officer of the United States, to wit, as such Congressman as aforesaid."

"TWENTY-EIGHTH. In refusing to charge the jury that it was not sufficient to establish an intent to defraud upon the part of the defendant, if the payment of money by any one of the persons named in the indictment to Mr. Lauterbach was in contemplation, unless such conduct contemplated the wrongful payment of money."

"THIRTIETH. In charging the jury that it would be sufficient for them in order to find the defendant guilty to find that his actions, even though they would have been wrongful if performed and done by a Congressman in fact, fairly and apparently pertained and related to the acts of a member of Congress."

"THIRTY-FIRST. In submitting to the jury the question as to whether or not the acts of the defendant came within the province of a person taking upon himself to act as an officer acting under the authority of the United States without defining what acts came within the province of an officer acting under the authority of the United States."

"THIRTY-SECOND. In refusing to charge the jury that they could not convict the defendant unless they found from the evidence that the offense was committed within the territorial jurisdiction of the United States District Court for the Southern District of New York" (pp. 61 *et seq.*).

Assignments of Error numbered "Thirty-third," "Thirty-fourth," "Thirty-fifth," "Thirty-eighth," "Thirty-ninth," "Fortieth," "Forty-first" and Forty-second" substantially re-state the assignments of error previously quoted in other forms.

BRIEF OF THE ARGUMENT.

POINT I. A Congressman is not an officer of the United States.

AUTHORITIES.

Bowen's Documents of the Constitution.
Farrand Records of the Federal Convention, Vol. I, p. 376; Vol. III, pp. 597-599-620.
Constitution of the United States, Articles 1, 2 and 6, Amendment XIV.
Blount's Case. Wharton's State Trials, 200.
Story's Commentaries on the Constitution, 1st ed. §791.
Tucker on the Constitution, §199.
Congressional Record, 1914—8831.
House of Representatives, 63d Congress, 2nd Session, Report No. 677.
U. S. v. *Germaine*, 99 U. S. 508.
U. S. v. *Mouat*, 124 U. S. 303.
U. S. v. *Smith*, 124 U. S. 525.
Burton v. *U. S.*, 202 U. S. 344.
People ex rel. Kelly v. *Common Council*, 77 N. Y. 503.
New York Public Officer's Law, Section 2, Art. 1.
Am. & Eng. Enc. of Law, 2nd Ed., Tit., "Public Officers," p. 322.
U. S. v. *Wiltberger*, 5 Wheaton, 76.
Hackfield v. *U. S.*, 197 U. S. 442.
Martin v. *U. S.*, 168 Fed. 198.
U. S. v. *Barnow*, 239 U. S. 74.
U. S. v. *Ballard*, 118 Fed. 757.
Statute of 1884, Chapter 26.
Mackey v. *Miller*, 126 Fed. 161.

POINT II. It was not charged or proven that the defendant pretended to act "under the authority of the United States."

AUTHORITIES.

U. S. v. *Curtain*, 43 Fed. 433.
U. S. v. *Bradford*, 53 Fed. 542.
U. S. v. *Taylor*, 108 Fed. 621.
U. S. v. *Ballard*, 118 Fed. 757.
U. S. v. *Brown*, 119 Fed. 482.
U. S. v. *Farnham*, 127 Fed. 478.
Littel v. *United States*, 169 Fed. 620.
U. S. v. *Barnow*, 239 U. S. 74.

POINT III. The indictment is defective in failing to describe the circumstances of the offence.

AUTHORITIES.

U. S. v. *Carll*, 105 U. S. 611.
Evans v. *U. S.*, 153 U. S. 584.
U. S. v. *Hess*, 124 U. S. 483.
Keck v. *U. S.*, 172 U. S. 434.
Moore v. *U. S.*, 160 U. S. 268.
Bartell v. *U. S.*, 227 U. S. 427.
Martin v. *U. S.*, 168 Fed. 198.

POINT IV. There was no proof of an intent to defraud.

POINT I.

A Congressman is not an Officer of the United States.

The status of a Congressman is fixed by the Constitution, which also determines who are the officers of the Government.

It will be presumed that these terms are used in the same sense in an Act of Congress, unless there is something in the Act which requires a different interpretation.

In the argument of this point it will be shown, first, that a Congressman is not an "officer," as that term is defined by the Constitution, and, secondly, that the term "officer" is employed in the same sense in Section 32 of the Criminal Code.

Before discussing the relevant provisions of the Constitution it is necessary to go back to the history of the time when the Constitution was adopted. When we recall the situation which existed when the Convention met, and the political theories which were then current, we shall see how the provisions in question came to be embodied in it, and we shall also get a clear interpretation of their terms. The country was still smarting from the British oppression. This had been exercised by the instrumentality of the Crown officers. The Colonies had given concrete expression to this grievance in the Declaration of Independence:

> "He has erected a multitude of new offices and sent hither swarms of officers to harass our people and eat out our substance."

Having so long been engaged in this conflict with the king's officers, the people had come to regard politics as chiefly a struggle between the legislative and executive

branches of the Government. They were confirmed in this view by the course of events in England, where a similar conflict, begun early in the Eighteenth Century, still persisted (although to a less extent) at the time when the Constitution was being framed. In the work of the Convention, therefore, there was a consistent design to make the legislative department, which represented the people, a barrier against usurpation or abuse of power by the executive and judicial departments, which, together, constituted the administrative power. In the choice of language there is a precision which defies ambiguous interpretation. No necessary detail was omitted in regulating the appointment, control and discipline of the executive and judiciary. The term which is consistently used to designate the incumbents of positions in these branches, is "officer," and this is used throughout as an exclusive term, often *for the purpose* of distinguishing them from members of the legislative branch. We can find no wavering on this subject from the beginning to the end of the Convention proceedings. It was the subject of much anxious thought and the provisions finally adopted were the fruit of many suggestions and tentative drafts. The following are examples:

Franklin's Plan of Union of the Colonies (1754) had provided:

> "All civil officers are to be nominated by the Grand Council and to receive the President General's approbation before they officiate."

The Pickney plan, Section 5, provided:

> "The members of each House shall not be eligible to, or capable of holding any office under the union during the time for which they have been respectively elected, nor the members of the senate for one year after."
>
> (Farrand Records of the Federal Convention, Vol. 3, Appendix D, p. 597.)

"The Executive Power of the United States shall be vested in a President of the United States of America. . . . He shall commission all the officers of the United States, and except as to ambassadors, other ministers, and judges of the Supreme Court he shall nominate, or with the consent of the Senate, appoint all other officers of the United States."

(*ib.* Vol. 3, p. 599.)

Mr. Butler supported this provision, explaining:

"This protection against intrigue was necessary. He appealed to the example of Great Britain, where men went into Parliament that they might get offices for themselves or their friends. This was the source of the corruption that ruined their government."

(*ib.* Vol. I, p. 376.)

Alexander Hamilton's plan, Article 2, Section 8:

"The acceptance of an office under the United States by representatives shall vacate his seat in the Assembly."

(*ib.* Appendix F, Vol. 3, p. 620.)

He further provided that the President was to have:

"The sole appointment of the head or chief officers of the departments of finance, war and foreign affairs; to have the nomination of all other officers, ambassadors to foreign nations included, subject to the approbation or approval of the senate."

(*ib.*)

The Constitution contains the following provisions in regard to officers:

Article 1, Section 6, Clause 2:

"No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time;

and no person holding any office under the United States, shall be a member of either House during his continuance in office."

Article 2, Section 1, Clause 2, provides in connection with the election of the President:

"But no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

Article 2, Section 2:

"He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of law, or in the heads of Departments.

"The President shall have power to fill up all vacancies that may happen during the Recess of the Senate, by granting commissions which shall expire at the end of their next session." (Clause 3.)

Article 2, Section 3:

"He * * * shall commission all the officers of the United States."

Article 2, Section 4:

"The President, Vice-President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

Article 6:

"The Senators and Representatives before men-

tioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States." (Clause 3.)

Amendments, Article XIV, Section 3:

"No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

The distinction between an officer on the one hand and a Senator or Representative on the other, is exhibited in the first, second, third, sixth and seventh of the above extracts; nowhere in the Constitution is there any passage which gives color to the interpretation that a Congressman is an officer of the United States.

The question came up, and, one would have supposed, was decided for all time in the *Blount* Case (Wharton's State Trials, p. 200). Blount was a Senator of the United States. He incurred the suspicion of promoting a filibustering exposition against the then Spanish possession of the two Floridas. He was impeached in 1797, and filed his plea that the proceedings were void. Bayard and Harper represented the Managers of the Impeachment, and Dallas and Ingersoll represented Blount. In the debate (which is to be found in pages 261 to 314 of Wharton) every argument which could

be used on either side was urged. In the end the Senate decided by vote of fourteen to eleven to dismiss the proceeding (p. 316). The ground upon which the dismissal rested is shown by the resolution negatived on the day preceding: "That William Blount was a civil officer of the United States, within the meaning of the Constitution of the United States, and, therefore, liable to be impeached by the House of Representatives" (p. 315). Of the Senators who voted to dismiss, Read, Langdon and Martin had been members of the Convention which framed the United States Constitution. Of the minority none had been members of the Convention.

The decision of the Senate received the approbation of leading textbook writers:

Story says:

> "A question arose upon an impeachment before the senate in 1799, whether a senator was a civil officer of the United States, within the purview of the constitution; and it was decided by the senate, that he was not; and the like principle must apply to the members of the house of representatives. This decision upon which the senate itself was greatly divided, seems not to have been quite satisfactory (as it may be gathered) to the minds of some learned commentators. The reasoning, by which it was sustained in the senate, does not appear, their deliberations having been private. But it was probably held, that 'civil officers of the United States' meant such, as derived their appointment from, and under the national government, and not those persons, who, though members of the government, derived their appointment from the states, or the people of the states. In this view, the enumeration of the president and vice-president, as impeachable officers, was indispensable; for they derive, or may derive, their office from a source paramount to the national government. And the clause of the constitution, now under con-

sideration, does not even affect to consider them officers of the United States. It says, 'president, vice-president, and all civil officers (not all other civil officers) shall be removed,' &c. The language of the clause, therefore, would rather lead to the conclusion, that they were enumerated, as contradistinguished from, rather than as included in the description of, civil officers of the United States. Other clauses of the constitution would seem to favour the same result; particularly the clause, respecting appointment of officers of the United States, by the executive, who is to 'commission all the officers of the United States'; and the 6th section of the first article, which declares, that 'no person, holding any office under the United States shall be a member of either house during his continuance in office'; and the first section of the second article, which declares, that 'no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.' It is far from being certain, that the convention itself ever contemplated, that senators or representatives should be subjected to impeachment; and it is very far from being clear, that such a subjection would have been either politic or desirable." (Story, Commentaries on the Constitution, 1st ed., Sec. 791.)

Tucker says:

"(l) The collation of these several clauses and others in the Constitution clearly indicates that the Constitution, in the use of the term 'civil officers,' intended to embrace merely those who were commissioned as such under the appointing power named in section 2 of article II of the Constitution. Nowhere in the Constitution is a senator or representative spoken of as an officer of the United States, or even as an officer at all, and in article I, section 6, clause 2, of the Constitution, the distinction between a senator or representative and a civil officer of the United States is very clearly made.

"(m) Besides, the mention of President and Vice-

President with all civil officers of the United States, and the omission of senators and representatives, leads to the conclusion that the senators and representatives were excluded from those who were amenable to impeachment. Senators and representatives are not commissioned by the President, and yet the President is required to commission all the officers of the United States; nor are they appointed by the President with the consent of the Senate, though the President is required to appoint all judges 'and all other officers of the United States.' It is obvious, therefore, that the impeachment power was intended to enforce the responsibility of those who held commissions under the United States government, and not of those who held their officers or their positions by virtue of the elective power of the people of the States. The naming of President and Vice-President, and the non-naming of senators and representatives, shows that only civil officers appointed and commissioned by the President were amenable to impeachment, except those expressly named, President and Vice-President, and senators and representatives coming under neither of these, and not expressly included, were excluded from the impeaching power.

"(n) The judgment of impeachment was to remove from office and to disqualify from holding office under the United States the officer convicted, and to disqualify him from holding any office under the United States. These terms properly limit the jurisdiction of the tribunal to try impeachments to those who hold offices under the United States. A senator or representative does not hold office under the United States. The one is elected by the State legislature, the other by the people of the State. His authority is in nowise derived from the United States. He is responsible to the power that gave him authority, and not to the government of which he is a part and which could give him no authority. If to this it is answered that neither is the President or Vice-President appointed by the United States

> government, and therefore should not be impeachable, the reply is conclusive; they would not be so unless they had been expressly mentioned, and the senator and representative not being expressly mentioned is not within the reason of the impeachment power nor within its terms." (Tucker on the Constitution, Sec. 199.)

No question was made in Congress of the correctness of this decision until, in the heat of the Civil War, Charles Sumner carried in the Senate a resolution compelling recalcitrant Senators to take an oath which had been prescribed for officers. Of course, there was no doubt that the Senate could prescribe any form of oath which it wished, subject to Article 6 of the Constitution. Sumner's observations in the course of the debate as to the status of a Senator were made much of by the Government in its brief on the motion to dismiss. They are of insignificant value as a contribution to Constitutional Law and, such as they are, they are swept away by Article XIV, Section 3 of the Constitutional Amendments (adopted after the war) as follows:

> "No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof."

The House of Representatives has also given its judgment on the matter. The question arose under Section 118 of the Criminal Code, which makes it a crime to solicit political contribution from officers of the United States. The House resolved on May 19th, 1914, that this

did not apply to cases of solicitation from Members of Congress. (Congressional Record, 1914, p. 8831). In this they confirmed the report of the committee which was appointed to consider the subject. The following is an abstract from the Committee's Report:

> "The language employed in the sections being considered, it seems clear that Congress recognized the distinction between Senators and Members of Congress and 'officers of the United States.' Senators and Members are not 'officers' as the term is used.
>
> In United States *v.* Mouat, reported in 124 U. S. at page 307, Mr. Justice Miller, speaking for the court said:
>
> > 'What is necessary to constitute a person an officer of the United States in any of the various branches of its service has been very fully considered by this court in United States *v.* Germaine (99 U. S. 508). In that case it was distinctly pointed out that under the Constitution of the United States all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.'
>
> In United States *v.* Smith, reported in 124 U. S., at page 532, Mr. Justice Field, speaking for the court, said:
>
> > 'An officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the Government who does not derive his

position from one of these sources is not an officer of the United States in the sense of the Constitution.'

In Burton *v.* United States, reported in 202 U. S. at page 369, Mr. Justice Harlan, speaking for the Court, said:

'While the Senate, as a branch of the legislative department, owes its existence to the Constitution and participates in passing laws that concern the entire country, its members are chosen by State legislatures, and can not properly be said to hold their places under the Government of the United States.' "

(House of Representatives, 63d Congress, 2d Session, Report No. 677.)

The decisions of the courts have been in harmony with the resolution of the Senate in the Blount case and of the House of Representatives in the instance just cited.

United States v. *Germaine,* 99 U. S. 508.
United States v. *Mouat,* 124 U. S. 303.
United States v. *Smith,* 124 U. S. 525.
Burton v. *U. S.,* 202 U. S. 344.

In *U. S.* v. *Germaine,* 99 U. S. 508, this Court said:

"The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when officers became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the Courts of Law, or in the heads of departments. That all persons who can be said to hold an office under the Government * * * were intended to be included within one or the other of these modes of appointment there can be but little doubt. This

> Constitution is a supreme law of the land, and no act of Congress is of any validity which does not rest on authority conferred by that instrument. It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish anyone not appointed in one of those modes. If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used, * * *'' (pp. 509, 510).

In *Burton* v. *U. S., supra*, the very point, *i. e.*, whether a member of one of the Houses of Congress was an officer of the United States, was considered by the court. Burton was a Senator of the United States, and was convicted under the statute making it a crime for any Senator to receive compensation for services rendered in any matter in which the United States was a party, or directly interested, before any Government Department. The Statute provided that in addition to a fine, the defendant should be rendered forever incapable of "holding any office of honor, trust or profit under the Government of the United States."

Burton contended that the sentence of the Court rendering him ineligible to office was inconsistent with his constitutional right to serve for the full term for which he was elected. The Court held:

> "the final judgment of conviction did not operate *ipso facto*, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment. The seat into which he was originally inducted as a Senator from Kansas could only become vacant by his death, or by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers. This must be so for the further reason that the declaration in in Section 1782, that anyone convicted under its provisions should be incapable of holding any office of

> honor, trust or profit 'under the Government of the United States' refers only to officers created by or existing under the direct authority of the national Government as organized under the Constitution, and not to offices the appointment to which are made by the States, acting separately, albeit proceeding, in respect of such appointments, under the sanction of that instrument. While the Senate, as a branch of the legislative department, owes its existence to the Constitution, and participates in passing laws that concern the entire country, its members are chosen by State legislatures and *cannot properly be said to hold their places 'under the Government of the United States,'* " (pages 369-370). (Italics ours.)

The decision of the Court of Appeals of New York, in *People ex. rel Kelly* v. *Common Council,* 77 N. Y. 503, is to the same effect.

> See also New York Public Officers' Law, Sec. 2, Art. 1.

Not only is the distinction between an officer and Congressman carried out consistently throughout the Constitution, but it is also to be found in the Statutes, *e. g.* Sections 110 and 117 of the Criminal Code, where bribery of officers and of Congressmen are treated as matters entirely distinct.

The theory of the Courts below as to the status of a Congressman was based on suggestions which are not illumining. They may be summed up in this sentence from one of the opinions.

> "In other words, a Senator, or a Congressman, a member of the House of Representatives, elected by or from a district in the State of New York, no more represents that district than he represents the people of the State of Connecticut, and every other of the states and territories in this Union. His purposes are legislative" (p. 8).

Here the learned Judge was confusing a question of

status with one of political morals. Of course, a representative in Congress is bound to regard the interests of the people as a whole, as was long ago stated by Edmund Burke in his Address to the Electors of Bristol, and by Blackstone, Book 1, chap. 2, p. 159, of the Parliament; but nevertheless he continues to be the representative of his district. The distinction was well observed in *Burton* v. *U. S.* (See the above-quoted extract from the opinion.)

There is therefore no support in law for the argument that a representative is an officer of the United States, or an officer of any kind.

The word in its ordinary or popular signification is used as it is in the Constitution. When we speak of officers we mean those whose duties are to administer and not those who legislate. We mean *agents of the State.*

> "In the most general and comprehensive sense a public office is an agency for the state, and a person whose duty it is to perform this agency is a public officer."
>
> Am. & Eng. Enc. of Law, 2nd. Ed., Tit. "Public officers," p. 322.

It remains to be considered, therefore, whether the term "officer" is used in Section 32 of the Criminal Code in a different sense.

In determining the point this principle should control, viz.: that in order to be comprehended within the statute, the charge must relate to a person who, or an act which, is by the express terms of the law, *clearly* within the class of persons or acts which it denounces.

In *United States* v. *Wiltberger*, 5 Wheaton, 76, the Court said, at page 96:

> "The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not

> suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

Hackfield v. *United States*, 197 U. S., 442, is to the same effect, quoting the Wiltberger case with approval.

United States v. *Germaine*, 99 U. S., 508, is especially relevant because the Court was discussing the meaning of the word "officer" in a Criminal Statute.

> "It is, therefore, not to be supposed that Congress, when enacting a criminal law for the punishment of officers of the United States, intended to punish anyone not appointed in one of those modes. *If the punishment were designed for others than officers as defined by the Constitution, words to that effect would be used.*" (Italics ours) p. 510.

An so in *Martin* v. *United States*, 168 Fed., 198, the Court in considering whether a clerk of the commissioner of the Five Civilized Tribes was included within the provisions of the statute providing that every officer having the custody of any record shall be forbidden to do certain acts enumerated, said, at page 203:

> "If Congress had intended that every clerk or employee should be subject to the severe penalties of that section it would not have failed to use some such apposite expression as 'clerk' or 'servant' or 'person in the employment of the Government,' and it would be a violation of a familiar and salutary rule of law to insert these terms in this statute by construction after the event." (Citing *U. S.* v. *Germaine* (*supra*); *U. S.* v. *Hartwell*, 6 Wall., 385, and other cases.

The purpose of the Act has been described in *United States* v. *Barnow*, 239 U. S. 74, and in *United States* v.

Ballard, 118 Fed. 757. It was pointed out how the public might be imposed upon by persons representing themselves to be exerting Federal authority and how petty frauds had been frequently committed by the impersonation of marshals, revenue officers and others whose duty it is to collect money on behalf of the United States, or in other ways to represent the Government.

The Statute of 1884, April 18, Chapter 26, which is the basis of the present act, was an amplification of Section 5448 of the Revised Statutes, enacted to protect the operations of revenue officers. Section 5448 was as follows:

> "Every person who falsely represents himself to be a revenue officer, and, in such assumed character, demands or receives any money or other article of value from any person for any duty or tax due to the United States, or for any violation or pretended violation of any revenue law of the United States, shall be deemed guilty of a felony," etc.

When Congress passed the Act of 1884, which included officers of every kind, its purpose is indicated in the margin (to which it is permissible to refer, *Mackey* v. *Miller*, 126 Fed. 161) as follows:

> "Persons assuming or pretending to act under authority of the U. S."

It will be seen, therefore, that the mischief which Congress had in mind, was the use by impostors of *the authority of the United States.* The authority of the United States is exercised by judges, ambassadors, cabinet officers, department heads, department subordinates, marshals, revenue officers, and other officials and employees too numerous to mention. Each of them, within the scope of his duties, is acting on behalf of the United States. A Congressman never exercises the authority of the United States, as these do, and there is no policy which requires that he should be protected from impersonation, because such a case as this has never occurred before and probably never will again.

POINT II.

It was not charged or proven that defendant pretended to act "under the authority of the United States."

Section 32 of the Criminal Code has been construed in the following cases:

United States v. *Curtain*, 43 Fed. 433,
United States v. *Bradford*, 53 Fed. 542,
United States v. *Taylor*, 108 Fed. 621,
United States v. *Ballard*, 118 Fed. 757,
United States v. *Brown*, 119 Fed. 482,
United States v. *Farnham*, 127 Fed. 478,
Littell v. *United States*, 169 Fed. 620,
United States v. *Barnow*, 239 U. S. 74.

In the last case, this Court, interpreting the Act, in harmony with the decisions in the lower Courts, held that it created two offenses:

> "(1) With intent to defraud either the United States or any person, the falsely assuming or pretending to be an officer or employee acting under the authority of the United States, or any department, or any officer of the Government thereof, and taking upon oneself to act as such.
>
> "(2) With intent to defraud either the United States or any person, the falsely assuming or pretending to be an officer or employee, etc., and in such pretended character demanding or obtaining from any person or from the United States, or any department, or any officer of the Government thereof, any money, paper, document, or other valuable thing."

So in *U. S.* v. *Taylor* (*supra*):

> "The first portion of the act, in my opinion, makes an important element of the offense to consist of making use of the assumed or pretended position * * * in which the impersonator, acting under the assumed authority of the United States *undertakes to*

assert the authority of the United States, and, in so doing, to defraud" (italics ours).

The indictment in this case relates to the *first offense* above described, for it uses the expression: "did take upon himself to act as such," and does not charge that: "he demanded or obtained from any person, &c., any money, paper, document, or other valuable thing." "This indictment is founded upon the first clause of the Statute" (opinion on demurrer, p. 9). It fails, however, to allege that he pretended to be "acting under the authority of the United States," etc., and therefore omits the very core and essence of the offense.

It will be seen that the Judge, in charging the jury, although he was undertaking to recite the first part of the Statute, also omitted the essential words "acting under the authority of the United States, &c." (p. 51). In doing this, he was evidently influenced by the absence of these words from the indictment. The District Attorney in drawing the indictment had good reason for omitting them. To include them would have demonstrated at the outset the absurdity of the charge, because it would have been seen from a consideration of the nature of a Congressman's duties that the defendant could not have been pretending to act under the authority of the United States.

The Judge's initial error in disregarding these words led him into a further mistake. The succeeding words "and shall take upon himself to act as such," now took on a meaning which they did not have in the Act. The statute sets forth three elements of the crime. The first is the intent to defraud; the second is the impersonation. The third element is the *act* committed by the offender pursuant to his intent and in the course of the impersonation. The words "as such" characterizing the act mean "as such officer or employee acting under the authority of the United States," etc. In the way the Trial Judge employed the words, they meant only "as such officer or

employee," because he had eliminated from the preceding passage the words "acting under the authority of the United States." He therefore concerned himself throughout his charge only with the question of what a Congressman could do officially, and not with the narrower question of what a Congressman can do under the authority of the United States. He said:

> "To assume and pretend to be a member of Congress is to impersonate a member of Congress in name or appearance, while to take upon oneself to act as a member of Congress is to impersonate such member of Congress in official conduct and actions. However, to warrant a finding against the respondent upon this element or branch of the case, it will not be necessary for you to find that he, in the assumed and pretended character and role of Congressman Palmer, did an act which the real Congressman Plamer might and could have done rightfully and lawfully.
>
> But in that regard it will be sufficient if you find that his actions, even though they would have been wrongful if performed and done by a congressman in fact, fairly and apparently pertained and related to the acts of a member of Congress, and you also find that he, at the same time, claimed to be acting in an official capacity as a member of Congress, and not as an individual or a mere political leader." (Page 52.)

This erroneous instruction would not have been given if the Court had had in mind the words of the Statute. It was bad enough to hold that a scheme of extortion would pertain or relate to the acts of a member of Congress, but certainly it would have been impossible to say that such a scheme could be perpetrated by a Congressman "under the authority of the United States." He should have directed a verdict of not guilty.

It follows that the offense charged and proven does not come within the first clause of the Act, under which the indictment was laid.

POINT III.

The indictment is defective in failing to describe the circumstances of the offense.

Upon the motion to dismiss the appeal for want of jurisdiction of this Court, the plaintiff in error urged that the failure of the indictment to describe the circumstances of the offense was a denial of defendant's constitutional right to be informed of the nature and cause of the accusation.

Under this point we are discussing *the insufficiency of the indictment as a pleading*, and in no way undertake to call upon this Court to reconsider the failure of the indictment to describe the circumstances of the offense as a constitutional question or as affecting the jurisdiction of the Court below.

It will be noted that Section 32, Criminal Code, does not specify what particular act or acts shall or may constitute the assumption or pretense of being an officer, or what act or acts shall or may constitute the taking upon oneself to act as such officer: in other words, that as respects both the assumption or pretense in contemplation of the Section, and the taking upon oneself to act as the assumed officer, the language of the Section is most general, in a word, generic.

The language of the indictment in each count merely attempts to follow the language of the Section without giving any particulars as to the manner of the alleged assumption or pretense or of the taking upon himself by the defendant to act as the assumed officer indicated. *That such an indictment is insufficient, clearly appears from the decisions.*

In *United States* v. *Carll*, 105 U. S., 611, 612, the Court said:

"The language of the statute on which this indict-

ment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offence at which it is aimed is similar to the common-law offence of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object.

"This indictment, by omitting the allegation contained in the indictment in United States *v.* Howell (11 Wall. 432), and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a 'defect or imperfection in matter of form only,' within the meaning of Sec. 1025 of the Revised Statutes. *By the settled rules of criminal pleading*, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be answered in the negative."

To the same effect see *Evans* v. *United States*, 153 U. S., 584, 587.

In *United States* v. *Hess*, 124 U. S. 483, 486-7, the Court said:

"The statute upon which the indictment is founded only describes the general nature of the offence prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence, states no matters upon which issue could be formed for submission to a jury. The general, and, with few exceptions, of which the present is not one, the universal rule on this subject, is, that all the material facts and circumstances embraced in the definition of the offence must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole

pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital."

And in *Keck* v. *United States*, 172 U. S., 434, 437, the Court said:

"Was the first count sufficient?"

This count was based upon that portion of section 3082 of the Revised Statutes, which made it an offence to "fraudulently or knowingly import or bring into the United States, or assist in doing so, any merchandise, contrary to law."

"It was charged in the count that Keck, on the date named, 'did knowingly, wilfully and unlawfully import and bring into the United States,' and did assist in importing and bringing into the United States, to wit, into the port of Philadelphia, 'diamonds of a stated value,' 'contrary to law and the provisions of the act of Congress in such cases made and provided, with intent to defraud the United States.'

As is apparent, the alleged offence averred in this count was charged substantially in the words of the statute. In the argument at bar counsel for the United States conceded the vagueness of the accusation thus made; and, tested by the principles laid down in United States *v.* Carll, 105 U. S. 611, 612; United States *v.* Hess, 124 U. S. 483; and Evans *v.* United States, 153 U. S. 584, 587, the count was clearly insufficient.

The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words 'contrary to law,' contained in the statute, clearly relate to legal provisions not found in section 3082 itself, but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise. The generic expression, 'import and bring into the United States,' did not convey the

necessary information, because importing merchandise is not *per se* contrary to law, and could only become so when done in violation of specific statutory requirements. As said in the Hess case, at p. 486:

'The statute upon which the indictment is founded only describes the general nature of the offence prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence states no matters upon which issue could be formed for submission to a jury.' "

In *Moore* v. *United States*, 160 U. S. 268, the defendant being a Postmaster of the City of Mobile, was charged under the Act of 1875 with embezzling a certain sum of money, the property of the United States. The Act provided:

"That any person who shall embezzle * * * any money, property, record, etc. * * * or property of the United States shall be guilty of a felony."

The indictment was attacked upon the ground that it was insufficient in that it did not contain an averment that the money came into the possession of the defendant in his capacity as an employee connected with the post-office operations of the United States.

After distinguishing embezzlement from larceny and holding that in a case of embezzlement it was necessary to show that the appropriation of property by a person to whom it had been entrusted or into whose hands it had lawfully come, the court held that the indictment was defective and that a count in the words of the statute was not sufficient, saying at page 270:

"That all the ingredients of fact that are elemental to the definition must be alleged so as to bring the defendant precisely and clearly within the statute; if that can be done by simply following the words of the statute, that will do; if not, other allegations must be used"; and at page 274:

"For another reason, however, we think that the

indictment in this case is insufficient. If the words charging the defendant with being an employee of the post-office be material, then it is clear under the cases above cited that it should be averred that the money embezzled came into his possession by virtue of said employment. Unless this be so, the allegation of employment is meaningless, and might even be misleading, since the defendant might be held for property received in a wholly different capacity."

In *Bartell* v. *United States*, 227 U. S. 427 at 430, the Court held:

> "It is elementary that an indictment in order to be good under the federal constitution *and law* shall advise the accused of the nature and cause of the accusation against him in order that he may meet the accusation and prepare for his trial, and that after judgment he may be able to plead the record and judgment in bar of further prosecution for the same offence." (Italics ours.)

In *Martin* v. *United States*, 168 Federal Reporter, 198, the Court said, at page 205:

> "Where the words of the statute did not fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute an offence intended to be punished, an indictment in the words of the statute is insufficient; the crime must be charged with precision and certaintly, and every ingredient of which it is composed must be accurately and clearly alleged."

Both by demurrer and by motion in arrest of judgment, the defendant challenged the sufficiency of the indictment, which, in accordance with the principles enunciated and illustrated by the opinions quoted, is clearly insufficient.

In the indictment in question, the allegation is simply that the defendant "did falsely assume and pretend to be an officer" without stating in what manner he so assumed or pretended, or in what particular or respect the alleged

assumption or pretense consisted. The statement of the indictment is merely a conclusion of the pleader, the correctness of which the court is without opportunity to test, seeing that it is not informed what it is that the pleader has assumed to declare to be the assumption or pretense intended to be charged. And this applies equally to the allegation of the indictment that the defendant "did take upon himself to act as such" officer.

POINT IV.

There was no proof of an intent to defraud.

This case is peculiar in that the only evidence of what the defendant or his agent, Lauterbach, said or did, is derived at second hand from Mr. Ledyard's testimony. No denial is offered as to the truth of anything that the witness Ledyard testified. There was no issue to be resolved by the jury under the influence of oral or visual impressions, the determination of which would render their verdict conclusive. Any inference which they made can be reviewed here, because we have in the printed record all the material which the jury had to work with.

The record contains no basis upon which to work out an intent to defraud. Were one to speculate on the subject a hypothesis might be, although with difficulty, framed, which was consistent with a scheme to defraud. But that is not enough. The intent must be deducible from the testimony by a process of reasoning and not of speculation.

To "defraud" means "unlawfully, designedly and knowingly to appropriate the property of another."

(Bouvier, Tit. "Fraud"). How did the defendant seek to appropriate the property of the persons and corporations named in the indictment? The only suggestion of such an attempt is derived from Mr. Lauterbach's proposal of a fee for his services in acting as an intermediary (p. 54). But upon a reading of the testimony, the absurdity of this hypothesis is manifest. It was shown that he had occupied a position of considerable importance in the community. He had been at one time Chairman of the Republican County Committee (page 37), and he had also acted for Mr. Morgan in one or more transactions where he had been found useful. It also was clearly proved that he keenly felt the attitude of suspicion and distrust with which he was regarded by Mr. Morgan and his partners and that he wanted to vindicate himself in their esteem. Having that purpose, he welcomed the opportunity to be employed as an intermediary in the negotiations outlined in the Government's Exhibit No. 2. The candor and willingness with which he consented to have these conditions set down in writing show that he thought he was acting an honorable part. The resumption of relations with the Morgan firm, which he contemplated, was of much more consequence to him than a fee. That would be in accordance with human nature, and most particularly Mr. Lauterbach's nature as it is disclosed in the record. He shows eagerness to be of service and for recognition by a great banking firm. He would hardly accompany his appeal for improved relations with a demand for blackmail. The Government's theory of a sinister purpose is further dispelled by the proof that Mr. Lauterbach desired to have his authority confirmed by Speaker Clarke.

It is a curious process of logic which would attribute to the defendant an intent to defraud when Lauterbach, the sole beneficiary, if any, was innocent of such a design.

So much may be deduced, even without reference to the declaration of the defendant himself. As to this it was frankly admitted by Mr. Ledyard that the defendant told him that Mr. Lauterbach was wholly unauthorized to make a demand for money in any form (p. 25). Unless there is in the record proof of conduct inconsistent with this disavowal of a mercenary purpose, the statement must be accepted as a truthful expression of the defendant's intent. The avowed purpose of all these interviews was to accomplish the submission of the steel interests to the Democratic party.

At his first interview with Mr. Ledyard, he disclosed the character in which he approached him;

> "He then spoke of the policy of the Democratic party" (p. 17).

The second interview terminated with a reference to "the whole power of the majority of the Democratic party" (p. 20). At the third interview, the defendant asked Mr. Ledyard whether "my (Ledyard's) people were in a frame of mind to cooperate with the Democratic organization. I said 'you mean the Democratic organization at Washington?' He said 'Yes.' " (Page 22.) The rest of the testimony is to the same effect.

If the avowed purpose was not the real purpose, the jury was not justified in so inferring without better evidence than is revealed in the record.

LASTLY.

The judgment of conviction should be reversed.

Respectfully submitted,

A. Leo Everett,
H. B. Walmsley,
Francis L. Kohlman.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 895.

DAVID LAMAR

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPRINT OF PETITION FOR A WRIT OF MANDAMUS (EXHIBITS EXCLUDED) IN THE MATTER OF DAVID LAMAR. ORIGINAL.

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SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1915.

Original. No. —.

In the Matter of the Application of DAVID LAMAR for a Writ of Mandamus.

To the Honorables the Justices of the Supreme Court of the Untied States:

The petition of David Lamar, by A. Leo Everett, his attorney and counsel, respectfully shows:

That heretofore and on or about July 17th, 1913, an indictment was found against your petitioner in the District

Court of the United States for the Southern District of New York, alleging the commission of a crime under section 32 of the Criminal Code. That petitioner was tried in said court before Honorable C. W. Sessions and found guilty, and judgment was thereupon entered December 4, 1914, sentencing petitioner to imprisonment for said offense for the term of two years. Thereafter, and on January 25, 1915, your petitioner by the advice of counsel presented to one of the judges of the United States District Court for the Southern District of New York, a petition for a writ of error from the Supreme Court of the United States to review said judgment of conviction, and said writ of error was duly allowed on January 25, 1915.

That a citation was duly issued thereunder, and a supersedeas granted by the District Court. That the cause was thereafter numbered 434 on the October term, 1915, docket of this court.

That the record was duly certified on April 12, 1915, and filed with the clerk of this court on April 16, 1915; that thereafter the United States, by the Solicitor General, moved to dismiss said writ of error or to affirm the judgment. The motion came on to be heard in this court on January 17, 1916. On January 31, 1916, the court rendered an opinion directing that the writ of error be dismissed for lack of jurisdiction.

In the meantime, and on May 21, 1915, petitioner, also by advice of counsel and out of abundant caution, obtained a writ of error from the Circuit Court of Appeals for the Second Circuit, which was duly allowed by one of the judges of the United States District Court for the Southern District of New York, the same being to review the same judgment of conviction entered December 4, 1914.

That said writ of error was duly perfected, assignments of error were filed thereunder, and the record certified and filed in the United States Circuit Court of Appeals on or about May 27, 1915.

Thereafter and on October 4, 1915, the United States At-

torney for the Southern District of New York, made a motion in the United States Circuit Court of Appeals for the Second Circuit, for the dismissal of the writ of error therein upon the ground that a prior and inconsistent writ of error was pending in the Supreme Court of the United States. The proceedings thereon are described in the following order, which is also set forth in Exhibit C herewith annexed:

> "A motion having been made by counsel for the defendant in error to dismiss the writ of error herein upon the ground that another writ of error to review the same judgment is pending in the Supreme Court of the United States;
>
> And the court having given the plaintiff in error twenty days from the 5th day of October, 1915, in which to elect whether said writ of error pending in the Supreme Court be discontinued, in which event this motion is to be denied;
>
> And no election having been filed within the time limited by the court; upon consideration thereof, it is
>
> "Ordered that the writ of error herein be and hereby is dismissed.
>
> "Further ordered that a mandate issue accordingly."

A copy of the notice of motion of the United States is herewith annexed marked Exhibit A, the affidavit of Harold Harper in support thereof marked Exhibit B.

Copies of the order of the Circuit Court of Appeals, of its mandate and of the order thereon are herewith annexed marked Exhibits C, D, and E respectively.

That after the opinion was rendered in the Supreme Court of the United States, on January 31, 1916, ordering the dismissal of the writ of error therein, petitioner moved in the Circuit Court of Appeals for the reinstatement of the writ of error therein. That said motion was, on February 11, 1916, denied.

That the record, a transcript of which was filed in the Circuit Court of Appeals, is the same as that whereof a transcript was filed in this court, which is herein referred to and made a part of this petition as if incorporated at large.

Petitioner is advised and avers that the Circuit Court of Appeals erred in dismissing the writ of error therein and in subsequently refusing to reinstate the same, for the reason:

By the adjudication made January 31, 1916, by this court in "David Lamar, plaintiff in error, against the United States," it was determined that this court had no jurisdiction of the writ of error taken therefrom. The adjudication effectively determines that the petitioner had no remedy in this court, upon the record presented, to review the judgment of conviction. Consequently, the cases of

Columbus Construction Co. vs. Crane, 174 U. S. 600.
McLish vs. Roff, 141 U. S., 661.
Robinson vs. Caldwell, 165 U. S., 359.
Cincinnati, H. & D. R. R. Co. vs. Thiebaud, 177 U. S. 615.
Loeb vs. Columbia Township Trustees, 179 U. S., 472,

And all the other cases, in which it is held that a party cannot pursue his remedy by writ of error, both in the Supreme Court and in the Circuit Court of Appeals, are not applicable. The opinions in all those cases point out that the party had a remedy in the court to which he had first resorted. The principle stated therein is the ordinary one of election, viz., that a party having two remedies is precluded, by the election of one remedy, from employing the other remedy. But the principle is also undisputed that, in order to apply the doctrine of election, the court first resorted to was competent to grant a remedy.

> "The right to make an election must actually exist and if it shall appear that it did not, then it is quite immaterial, in its bearing upon a subsequent action, that some previous action, looking to a remedy for the plaintiff's loss, had been brought. * * * She had made no election, for there was no choice of remedies against the defendant, and in suing him with others, as for a conspiracy, she mistook, or misconceived, her remedy and was dismissed; but she did not forfeit her legal right to bring this action to recover from the defendant what he owed her. Any

step, or action, taken by her, which was fruitless, because proceeding upon a misconception of the rights which the law gave her, left her unaffected as to any legal remedy which she did possess."

Henry vs. Herrington, 193 N. Y., 218, at pp 222-223.

The cases of *Morris vs. Rexford,* 18 N. Y., 522; *Kinney . Kiernan,* 49 N. Y., 164, and *McNutt vs. Hilkins,* 80 un, 235, are to the same effect. Further citation is needss. The principle of *McLish vs. Roff* and other cases ould have arisen if this court had denied the motion to disiss the writ of error. Then, irrespective of how the decision ent upon the merits, its jurisdiction would have been clusive.

If *this* court was without jurisdiction, then there was mplete jurisdiction in the Circuit Court of Appeals *ab itio.* That court had no more power to put the petitioner an election than it had to dismiss the appeal. As the tuation confronted it on October 4, 1915, it either had risdiction or it had not. If it had no jurisdiction, by act of grace could jurisdiction be conferred. If it had risdiction, jurisdiction could not be denied.

It had two courses open to it: either to determine at that me its jurisdiction, which could only be done by scrutinizng the record in the Supreme Court and determining hether that court had jurisdiction, or to adjourn the hearng until the Supreme Court should have determined the uestion of jurisdiction in the cause before it. If it had dopted the former course, and determined correctly the uestion of the Supreme Court's jurisdiction, it would have een bound to conclude that it, the Circuit Court of Appeals, lone had jurisdiction and to refuse to dismiss the writ of rror. But the latter course was that which, out of comity nd convenience, it should have followed, and which in milar cases has been followed in the past.

Pullman's Palace Car Co. vs. Central Transportation Co., 171 U. S., 138; *The Ira M. Hedges,* 218 U. S., 264 (this appears from an examination of the Circuit Court of Appeals records).

The petitioner believes that he was justified by these precedents in pursuing the practice adopted by him. Such a course was dictated not only by principle, but by the explicit recommendation of the Circuit Courts of Appeal in the First and Sixth Circuits.

Hubbard vs. Worcester Art Museum, 196 Fed., 871.
Darnell vs. Illinois Central R. R. Co., 206 Fed., 445.

In the former case the defendant's writ of error in the Supreme Court was dismissed. Thereafter he prosecuted a writ of error from the Circuit Court of Appeals, attempting to bring himself within the statutory limit of six months by eliminating the time within which the writ of error was pending in the Supreme Court. Held, that the writ of error was too late. The court said at page 873:

> "At any rate there can be no question that, notwithstanding the pendency of a writ of error in the Supreme Court, the plaintiff below had the right to take out an optional writ of error to the Circuit Court of Appeals, and thus guard himself against the very difficulties that arise here. This is evidently the theory in *Union Bank vs. Memphis*, 189 U. S., 71, 74; 23 Sup. Ct., 604; 47 L. Ed., 712; and *Carter vs. Roberts*, 177 U. S., 496, 500; 20 Sup. Ct., 713; 44 L. Ed., 861."

In *Darnell vs. Illinois Central R. R. Co.* (*supra*), the plaintiff took a writ of error from the Supreme Court. The court decided that the record did not present a question of the jurisdiction of the District Court as a Federal court and dismissed the writ of error (225 U. S., 243). The plaintiff then attempted to do what was tried in *Hubbard vs. Worcester Art Museum* (*supra*), that is, to take a writ of error from the Circuit Court of Appeals, claiming that the period during which he was in the Supreme Court should be eliminated to bring him within the statutory time of six months. The court held he could not do so:

"No satisfactory reason is pointed out why a party in such position may not protect himself by seeking review in both courts and maintaining both proceedings until in one or the other the jurisdictional question is decided. The cases of *Columbus Co. vs. Crane Co.*, 174 U. S., 600; 19 Sup. Ct., 721; 43 L. Ed., 1102, and *Railroad vs. Thiebaud*, 177 U. S., 615; 20 Sup. Ct., 822; 44 L. Ed., 911, do not militate against this practice, because they only hold that a party, having the lawful right to a review in one court or in another court, cannot have both, but must stand upon his election. Where a party has no right of choice, his ineffective pursuit of the remedy in the wrong court is 'not an election, but an hypothesis' *Northern Assurance Co. vs. Building Association*, 203 U. S., 106, 108; 27 Sup. Ct., 27; 51 L. Ed., 109. But it is unnecessary to decide whether the mistaken and the true hypothesis may be resorted to simultaneously. The statute imperatively requires that the right remedy should be invoked within the time limited" (p. 447).

The last case cited supports the doctrine as to election which was set forth above in *Henry vs. Herrington* (*supra*):

"The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies. It did not demand a judgment without regard to them and put them on one side, as was done in *Washburn vs. Great Western Insurance Co.*, 114 Massachusetts, 175, where this distinction was stated by Chief Justice Gray. Its choice of law was not an election but an hypothesis. It expressed the supposition that law was competent to give a remedy, as had been laid down by the Supreme Court of Nebraska and the Circuit Court of Appeals for the Circuit. *Home Fire Insurance vs. Wood*, 50 Nebraska, 381, 386; *Firemen's Fund Insurance Co. vs. Norwood*, 16 C. C. A., 136. So long as those decisions stood the plaintiff had no choice. It could not, or at least did not need to, demand reformation, if a court of law could affect the same result. It did demand the result, and showed by its pleadings that the

path which it did choose was chosen simply because it was supposed to be an open way. *Snow vs. Alley,* 156 Massachusetts, 193, 195."

Northern Assurance Co. vs. Building Association, 203 U. S., 106, at p. 108.

It will be recalled that the transcript of record was filed in this court on April 16, 1915. If the Solicitor General had moved promptly, the dismissal of the writ could have been accomplished before June 4th, that is, before six months had expired from the date of the judgment of conviction If a writ of error had, after such dismissal and before June 4th, been taken from the Circuit Court of Appeals, how can it be said that the Circuit Court of Appeals would not have had jurisdiction? Why should the petitioner's rights be prejudiced because, instead of moving to dismiss in April, 1915, the Solicitor General chose to wait until January, 1916? It is upon such an unsubstantial distinction as this that the Circuit Court of Appeals would rely, in order to deprive the petitioner of his right to review upon the merits.

This court has so recently examined the record that it is hardly necessary to urge that there are serious questions, going to the merits, which ought to be reviewed.

The extraordinary remedy of mandamus is sought because the action of the Circuit Court of Appeals was not an abuse of discretion but a denial of an absolute right, and the remedy sought is that prescribed by the precedents.

In re Parker, 131 U. S., 221.

Harrington vs. Holler, 111 U. S., 796, 797.

Wherefore petitioner prays that a writ of mandamus may issue to the before-mentioned Judges of the United States Circuit Court of Appeals for the Second Circuit and to the Circuit Court of Appeals for the Second Circuit directing that it recall its mandate and reinstate the writ of error heretofore brought therein, and that, pending the determination

of this application, this court will admit the petitioner to bail upon such terms as may be just and grant petitioner such other and further relief as may be just and proper in the premises.

And your petitioner will ever pray, etc.

DAVID LAMAR,
Petitioner.

A. LEO EVERETT,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

David Lamar, being duly sworn, deposes and says:

That he is the petitioner herein, and the foregoing petition is true to the best of his knowledge, information, and belief.

DAVID LAMAR.

Sworn to before me this 19th day of February, 1916.
GEORGE W. MARTIN,
Notary Public.

New York County Clerk's No. 2388.
New York Register's No. 6026.
Commission expires March 30, 1916.

Exhibit A.

UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT.

DAVID LAMAR, *Plaintiff in Error (Defendant Below)*,
vs.
UNITED STATES, *Defendant in Error (Plaintiff Below)*.

You will please take notice that upon the affidavit of Harold Harper hereto annexed and the exhibits thereto appended, the undersigned will move this court at a stated term thereof appointed to be held in and for the Second Circuit, at the United States Court House and Post-Office Building, in the Borough of Manhattan, city of New York, on the 4th day of October, 1915, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel may be heard, for an order dismissing the writ of error herein upon the ground of a prior and inconsistent writ of error pending in the Supreme Court of the United States at the time said writ was allowed and for such other and further relief as may be just in the premises.

Yours, etc.,

H. SNOWDEN MARSHALL,
U. S. Attorney, Southern District of New York,
Attorney for Defendant in Error.

Office and P. O. Address: U. S. Court House and P. O. Bldg., Borough of Manhattan, city of New York.

To Carl E. Whitney, Esq., Attorney for Plaintiff in Error, 15 William street, New York city.

Exhibit B.

UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT.

DAVID LAMAR, *Plaintiff in Error (Defendant Below)*,
vs.
UNITED STATES, *Defendant in Error (Plaintiff Below)*.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Harold Harper, being duly sworn, deposes and says that he is an assistant to the United States Attorney for the Southern District of New York, the attorney for the defendant in error in the above-entitled cause.

The plaintiff in error, David Lamar, was on the 3d day of December, 1914, duly convicted in the United States District Court for the Southern District of New York upon an indictment charging him with falsely assuming and pretending to be an officer of the Government of the United States with intent to defraud certain persons, in violation of section 32 of the United States Criminal Code. Thereafter and on the 25th day of January, 1915, said Lamar presented to the Honorable Augustus N. Hand, a District Judge of the United States of the Southern District of New York, his petition for a writ of error from the Supreme Court of the United States, a copy whereof is hereto annexed, marked Exhibit A, complaining that certain errors were committed by the trial court to his prejudice:

> "First. In respect to the court's jurisdiction of the subject-matter of the cause, as to which a certificate is granted pursuant to section 238 of the Judicial Code.
>
> "Second. In respect to the court's construction and application of the Constitution of the United States

and its disposition of the merits of the cause; all of which will more in detail appear from the assignment of errors which is filed with this petition."

Judge Hand noted at the foot of said petition his allowance of the writ, as more fully appears from said Exhibit A, and certified to the Supreme Court that the jurisdiction of the court is in issue, as appears from said certificate, a copy whereof is hereto annexed, marked Exhibit B. A writ of error from the Supreme Court of the United States in the usual form was allowed and issued on the 25th day of January, 1915. A copy of said writ of error is hereto annexed, marked Exhibit C. Said Lamar upon the same day filed certain forty-three assignments of error. These assignments are not limited to the question of the jurisdiction of the trial court, but also relate to the claim of the said Lamar that the court erred in construing and applying the Constitution of the United States and to the merits of the case generally. A copy of said assignments of error is hereto annexed, marked Exhibit D. A citation was duly issued on said 25th day of January, 1915, directing the United States to appear before the Supreme Court within thirty days, and the said United States has duly appeared by its Solicitor General. A copy of said citation is hereto annexed, marked Exhibit E. The record in the case was filed in the office of the Clerk of the Supreme Court on April 6, 1915. A certified extract from the minutes of the clerk of the Supreme Court showing the proceedings heretofore had therein is annexed hereto, marked Exhibit F. The case is pending and undetermined.

The writ of error from this court was issued upon the same judgment upon which the said writ of error Exhibit C, was issued from the Supreme Court of the United States, to wit, the judgment and conviction of the said Lamar for the offense heretofore mentioned, rendered on the 3d day of December, 1914. The writ of error in this court was issued May 21, 1915.

By reason of the foregoing, deponent respectfully requests

that an order be made and entered dismissing the writ of error herein upon the ground of said prior and inconsistent writ of error pending in the Supreme Court of the United States and for such other and further relief as may be just in the premises.

HAROLD HARPER.

Sworn to before me this 20th day of September, 1915.

[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings Co. No. 215.

Cert. filed in N. Y. Co. No. 181; Register's No. Kings Co. No. 7068; Register's N. Y. Co. No. 7172.

My commission expires Mar. 30, 1917.

Exhibit C.

At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Court Rooms in the Post-Office Building, City of New York, on the 29th Day of October, 1915.

Present:

Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

DAVID LAMAR, *Plaintiff in Error,*

vs.

THE UNITED STATES, *Defendant in Error.*

A motion having been made by counsel for the defendant in error to dismiss the writ of error herein upon the ground that another writ of error to review the same judgment is pending in the Supreme Court of the United States;

And the court having given the plaintiff in error twenty days from the 5th day of October, 1915, in which to elect

whether said writ of error pending in the Supreme Court be discontinued, in which event this motion is to be denied;

And no election having been filed within the time limited by the court; upon consideration thereof, it is

Ordered, that the writ of error herein be and hereby is dismissed.

Further ordered that a mandate issue accordingly.

E. H. L.
A. C. C.
H. G. W.

Exhibit D.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Whereas, lately in the District Court of the United States for the Southern District of New York, before you, or some of you, in a cause between United States and David Lamar, a judgment was entered in the office of the clerk of said court to review which a writ of error was duly sued out; as by the inspection of the transcript of the record of the said court, which was brought into the United States Circuit Court of Appeals for the Second Circuit, by virtue of said writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifteen, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Second Circuit, on a motion to dismiss said writ, and was argued by counsel: On consideration whereof, it is hereby

Ordered, adjudged and decreed, that the writ of error herein be and hereby is dismissed.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in accordance with the decision of this court as according to right and justice, and the laws of the United States, ought to be had, the said writ notwithstanding.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 29th day of October, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

Exhibit E.

At a Stated Term of the United States District Court for the Southern trict of New York, Held at the United States Court and Post Office Building in the Borough of Manhattan, City of New York, on the 6th Day of November, 1915.

Present: Hon. Charles M. Hough, Judge.

THE UNITED STATES OF AMERICA, *Plaintiff,*
vs.
DAVID LAMAR, *Defendant.*

Order on Mandate.

The above-entitled cause having come for trial in this court and a judgment having been rendered in favor of the United States and against the defendant and the defendant having thereafter by writ of error obtained a transcript of the record to be brought in the United States Circuit Court of Appeals for the Second Circuit and the said United States Circuit Court of Appeals having transmitted to this

court its mandate by which it appears that at the October Term of said court for 1915 this cause came on to be heard upon the motion of the United States to dismiss, on consideration whereof, it was

Ordered, that the said writ of error be and hereby is dismissed;

Now, upon reading and filing the said mandate and upon motion of H. Snowden Marshall, United States Attorney for the Southern District of New York, it is

Ordered, that the order of said Circuit Court of Appeals in this cause be and the same hereby is made the order of this court and that the said writ of error be and the same hereby is dismissed.

C. M. HOUGH,
U. S. District Judge.

17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 895.

DAVID LAMAR,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONER

A. LEO EVERETT,
H. B. WALMSLEY,
FRANCIS L. KOHLMAN,
Of Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

LIST OF AUTHORITIES.

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONER

Addendum.

At the time of the trial of the defendant, David Lamar, in the case of the United States vs. David Lamar, hereinbefore considered, the judges of the District Court of the United States for the Southern District of New York were the

following, and none other, namely, the Hon. Charles M. Hough, the Hon. Learned Hand, the Hon. Julius M. Mayer and the Hon. Augustus N. Hand, by none of whom was the said trial conducted, but the same was presided over and conducted by the Hon. Clarence W. Sessions, judge of the United States District Court for the Western District of Michigan.

The course and manner of the presiding over and conducting said trial by the said Hon. Clarence W. Sessions was through his designation and appointment to hold a District Court within the Second Circuit, with the same powers that are vested in the Judge of the District Court of the United States for the Southern District of New York, which designation and appointment was made under and pursuant to the provisions of the certain supposed Act of the Congress of the United States purporting to have been approved October 3, 1913, hereinafter at large set forth.

Chapter 1, section 18 of the Judicial Code of the United States is as follows:

> Sec. 18. Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interest shall require, the said judge or associate justice, or Chief Justice, shall designate and appoint any circuit judge of the circuit to hold said district court. (36 Stat. L., 1089.)

The supposed Act of Congress of October 3, 1913, is as follows:

> An Act to amend chapter one, section eighteen, of the Judicial Code.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress*

assembled, That chapter one, section eighteen, of the Judicial Code be amended by adding thereto the following:

"Whenever it shall be certified by the senior circuit judge of the second circuit, or, in his absence, by the circuit justice of said circuit, that on account of the accumulation or urgency of business in any district court in said circuit it is impracticable to designate and appoint a sufficient number of district judges of other districts within said circuit to relieve such accumulation or urgency of business, the Chief Justice may, if in his judgment the public interests so require, designate and appoint the judge of any district court in another circuit to hold a district court within the said second circuit, and to have and exercise within the district to which he is so assigned the same powers that are vested in the judge thereof: *Provided,* That such judge so designated and appointed shall have consented, in writing, to such designation and appointment: *And provided further,* That the senior circuit judge of the circuit within which such judge so designated and appointed resides shall certify, in writing, that the business of the district of such judge will not suffer thereby. Such appointment shall be filed in the clerk's office and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed. Each of the said district judges may, in the case of such appointment, hold separately, at the same time, a district court in such district, and discharge all of the judicial duties of the district judge therein." Approved, October 3, 1913.

Authority of Judge Sessions.

Honorable Clarence W. Sessions, U. S. District Judge,
Western District of Michigan, Grand Rapids, Mich.
Sir:

The Senior Circuit Judge of the Second Circuit, having certified that on account of the accumulation

and urgency of business in the District Court for the Southern District of New York, it is impracticable to designate and appoint a sufficient number of District Judges of other districts within said circuit, to relieve such accumulation and urgency of business, and your consent in writing to be designated and appointed to sit in the District Court, for the Southern District of New York, during the period beginning November 9, 1914, and ending December 5, 1914, and for such further time as may be required to complete unfinished business, having been duly signed and exhibited to me, and the Senior Circuit Judge of the Sixth Circuit having certified in writing that the business of the Western District of Michigan will not suffer by such designation, now, therefore, pursuant to the authority vested in me by Chapter 1, Section 18, of the Judicial Code, as amended by the Act of Congress, approved October 3, 1913, inasmuch as in my judgment the public interests so require, I DO HEREBY designate and appoint you to hold a District Court within the said Second Circuit, and in the Southern District of New York, during the period beginning November 9, 1914, and ending December 5, 1914, and for such further time as may be required to complete unfinished business, and to have and exercise within the said district to which you are so assigned the same powers that are vested in the judge thereof.

Dated Washington, D. C., October 22, 1914.

EDWARD D. WHITE,
Chief Justice of the United States.

PURSUANT to the provisions of Chapter 1, Section 18 of the Judicial Code, as amended by the Act of Congress, approved October 3, 1913, I, E. HENRY LACOMBE, Senior Circuit Judge of the Second Circuit, DO HEREBY CERTIFY, that on account of the accumulation and urgency of business in the District Court for the Southern District of New York, in this circuit, it is impracticable to designate and appoint a sufficient number of district judges of other dis-

tricts within this circuit to relieve the said accumulation and urgency of business.

Dated New York, October 9, 1914.

E. HENRY LACOMBE,
Senior Circuit Judge of the Second Circuit.

PURSUANT to the provisions of Chapter 1, Section 18 of the Judicial Code, as amended by the Act of Congress, approved October 3, 1913, I hereby consent to be designated and appointed by the Chief Justice of the United States to hold a District Court in the Southern District of New York, beginning November 9, 1914, and ending December 5, 1914, and for such further time as may be required to complete unfinished business.

Dated Grand Rapids, Michigan, Oct. 8, 1914.

C. W. SESSIONS,
U. S. District Judge Western District of Michigan.

PURSUANT to the provisions of Chapter 1, Section 18 of the Judicial Code, as amended by the Act of Congress, approved October 3, 1913, I, JOHN W. WARRINGTON, Senior Circuit Judge of the United States for the Sixth Judicial Circuit, DO HEREBY CERTIFY, that the business of the Western District of Michigan will not suffer by the designation and appointment of the Honorable Clarence W. Sessions, District Judge of the Western District of Michigan, by the Chief Justice, to sit in the District Court for the Southern District of New York, beginning November 9, 1914, and ending December 5, 1914, and for such further time as may be required to complete unfinished business.

Dated Cincinnati, Ohio, Oct. 7, 1914.

J. W. WARRINGTON,
Senior Circuit Judge of the Sixth Circuit.

United States of America, Southern District of New York, ss.:

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate, the consent, certificates and order designating the Hon. Clarence W. Sessions, U. S. District Judge for the Western District of Michigan to hold a District Court within the Second Circuit and in the Southern District of New York during the period beginning November 9, 1914, and ending December 5, 1914, and for such further time as may be required to complete unfinished business, filed October 24, 1914, have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this fourth day of February, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the said United States the one hundred and fortieth.

ALEX. GILCHRIST, JR.,
(Seal) *Clerk.*

From the foregoing, it will be noted that Judge Sessions was designated and appointed

> "To hold a *District Court* within the said Second Circuit."

(See above designation of the Chief Justice.)

Pursuant thereto, Judge Sessions consented

> "To be designated and appointed * * * to hold a *District Court* in the Southern District of New York."

THE QUESTIONS INVOLVED.

It will be argued that the District Court held by Judge Sessions as above mentioned had no jurisdiction to try the defendant, because of the provisions of the Sixth Amendment to the Federal Constitution. This contention will be established in the following points of the brief:

BRIEF OF THE ARGUMENT.

Point 1: The District Court held by Judge Sessions, in which the Defendant was tried under an indictment charging him with the commission of a crime, had no jurisdiction in view of the provisions of the Sixth Amendment to the Constitution of the United States.

As the jurisdiction of the Supreme Court of the United States is a constitutional creation, the organizing power vested in Congress did not carry with it the authority to rearrange it. Marbury vs. Madison, 1, Cranch, 138. Article 3, section 1, of the Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time establish." Section 2 of article 3 provides that "the judicial powers shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties," etc. Two things are necessary to create jurisdiction, whether original or appellate, in inferior courts of the United States. The Constitution must have given to the court the capacity to take it, and an Act of Congress must have supplied it. Nashville vs. Cooper, 6 Waters, 247. The subordinate judicial tri-

bunals of the United States can exercise such jurisdiction, civil and criminal, as may be authorized by an Act of Congress. Kentucky vs. Powers, 201 U. S.

The judicial power of the United States vested by the United States Constitution, article 3, paragraph 1, in the Federal courts, embraces all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto, *except so far as there are limitations expressed in the Constitution on the general grant of judicial power.* Kansas vs. Colorado, 206 U. S., 46. In that case the court said:

> "Section 2, which provides that 'the judicial power shall extend to all cases in law and equity, arising under this Constitution, and laws of the United States,' etc., is not a limitation or enumeration. It is a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There must be, of course, limitation on their grant of power, but if there are not any, they must be expressed."

The sixth amendment is a very positive and express limitation upon the general grant of judicial power contained in the Federal Constitution. It provides that

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by the impartial jury of the State and District wherein his crime shall have been committed, *which District shall have been previously ascertained by law,* and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory processes for obtaining witnesses in his favor, and to have the assistance of counsel for the defense."

In Sheldon vs. Sill, 8448, the court said: "It must be admitted, that if the Constitution had ordained and established inferior courts, and distributed to them their respective power, they could not be restricted or divested by Congress. As it has made no such distribution, one of two consequences must result—either each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these instances has never been asserted and could not be defined with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. And no statute enacted by Congress can create such a tribunal or confer such jurisdiction as the Constitution forbids.

The sixth amendment as a part of the bill of rights in the Federal Constitution was intended to guarantee to all persons accused of crimes in Federal courts, certain guarantees which in the English constitutional system had been clearly defined in the Bill of Rights of 1688. The unit of the English constitutional system is the English County. Every person indicted for crime in England possesses the right to be tried in that county in which the crime was committed upon an indictment found by a grand jury, drawn not from the whole county, but from the hundred in which the crime was committed. Such was the constitutional law of England in 1688.

The purpose of the framers of the sixth amendment was to make the Federal District as a judicial unit in the Federal system what the English County was as a judicial unit in the

English system. Only in the light of that fact is it possible to understand a guarantee of "the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law." The plain meaning is that the District in which such trial is to take place shall be a judicial unit, defined by law, and pre-existing as a distinct judicial entity, just as the English judicial county existed as a distinct judicial entity.

When the judicial system of the United States was organized by Congress by the Judiciary Act of 1789, in each District of the United States, as the Federal county, there was created one district court with definite boundaries, carefully defined by law, as a territorial unit. From that day to this the Federal judicial system of the United States has rested upon that clear and fundamental conception.

Therefore, when the sixth amendment says which district shall have been previously ascertained by law, it means that the territorial area of the jurisdiction of each district court as a territorial unit, must have been clearly defined and fixed by the law before a trial under a Federal indictment can take place.

As the business of the Federal courts increased, the practice grew to create more than one district judge in a district in which such an increase in the judicial staff might be necessary. *But it is perfectly abhorrent to all our constitutional ideas that more than one district court as such should exist in one district. Such an idea involves a contradiction in terms.* As in physical science, it is impossible for two bodies to occupy the same space at the same time, so it is legally impossible for more than one district court to exist at the same time in any one district defined by law, because each district has the limits of the jurisdiction of a

district and must have its own definitely defined territorial limits.

The radical and palpable vice in the act in question is clearly expressed in the closing paragraph of this act in these terms: "Each of the said district judges may in the case of such appointment, hold separately at the same time, a district court in such district, and discharge all of the duties of the district judge therein." The impossible attempt is thus made to establish in the New York district in question two or more distinct district courts in one district. As it is physically impossible under such conditions for each one of these separate courts to have definite boundaries "previously ascertained by law," the scheme embodied in this special act is a flagrant and palpable violation of that provision of the sixth amendment which provides—"which district shall have been previously ascertained by law." As the scheme embodied in this special act is in direct conflict with the sixth amendment it is necessarily null and void.

This view is not in conflict with the decisions of this Court in the cases of Ball vs. United States, 140 U. S., 118, and McDowell vs. United States, 159 U. S., 596.

In the Ball case the court was considering sections 591 and 596 of the Revised Statutes of the United States. These sections, in substance, provide that when any district judge is prevented by any disability from holding any stated or appointed term of his district court, the judge of any other district in the same circuit may be appointed to hold said court.

In the McDowell case there was a vacancy in the office of Judge for the Western District of South Carolina, and a Judge of the Eastern District in the same circuit was designated to fill the vacancy.

It will be noted that, in both of these causes, judges are appointed *to take the places* of other judges. No attempt is made *to create an additional court.* In section 18, however, *a new district court is created,* in a district which already is possessed of a district court which has been previously ascertained by law. The language of section 18 is:

> "Designate and appoint the judge * * * to hold a District Court within the said second circuit,"

and the last clause of said section is:

> "Each of the said district judges may separately hold at the same time a District Court in such district."

What is attacked in the present case is the attempt of the statute to create a district court, the territorial area of which has not been previously ascertained by law, and in addition thereto, created an additional district court in a territorial area which already has been clothed with a district court previously ascertained by law.

The distinction between our case and the McDowell case is adequately pointed out in Norton vs. Shelby County, 118 U. S., 448, in the following language at page 452:

> "But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. * * * An unconstitutional act is not a law. It confers no rights, it imposes no duties, it affords no protection, it creates no office, it is in legal contemplation as inoperative as though it had never been passed."

So in the case at bar, section 18 in attempting to create a new district court in a district which already has its dis-

trict court, creates no office. *Obviously the person who fills the office can not be deemed a de facto officer.* A *de facto* officer in the language of Norton vs. Shelby County can not exist where there is no office to fill.

> "This contention is made clear by the fact that there can be no officer either *de jure* or *de facto* if there be no office to fill."

It may be argued, as was stated by the Court in the McDowell case, that the district court is a court of inferior jurisdiction, and Congress had the right to create district courts at any time. This is true, *but in section 18 Congress attempted to create a district court without previously ascertaining and fixing its jurisdictional area,* and while the district court so appointed may have jurisdiction to try civil cases and otherwise, a person charged with criminal offense can not be tried therein because the Sixth Amendment guarantees to a person charged with a criminal offense, the right to be tried in a district court, the territorial area of which has been previously ascertained by law. The following language in the Norton case also points out the distinction which is urged in the case at bar that while in the McDowell case the Judge was appointed *in the place of* another person to hold a district court; in the case at bar section 18 attempts to appoint a judge to hold another and distinct and separate district court which the legislature attempts to create by that statute:

> "Where an office exists under the law it matters not how the appointment of the incumbent is made so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of office and exercises its powers and functions. Where there is no office, there can be no officer *de facto,* for the reason that there can be none *de jure.*"

Point 2: The designation of a Judge from a district in one circuit to hold a District Court in another circuit trespasses upon the executive power of appointment in that it permits a United States District Judge to hold court in a district to the court of which he was not nominated by the President and confirmed by the Senate.

The Constitution provides but one method of appointment for Federal judges. They can only be appointed during good behavior, by the President, with the advice and consent of the Senate. That method of appointment can only be exercised directly by those agents who have no power to delegate their appointing power to any other functionaries whatsoever. In the very teeth of those Constitutional provisions this Act provides a scheme whereby district judges in districts in question may be appointed by the Chief Justice of the Supreme Court of the United States. The whole scheme is therefore in conflict with the Constitutional scheme by which alone district judges may be appointed and armed with judicial power to try criminal cases in a given district.

Article 2 of the Constitution of the United States provides:

> "He (the President) shall have the power * * *, and he shall nominate, and by and with the advice and consent of the Senate, shall appoint * * * Judges of the Supreme Court, and all other officers of the United States."

The Constitution has given to the President of the United States the sole power of selecting or nominating judges who

must be confirmed by the Senate. An examination of the Convention debates at the time of the adoption of this clause of the Constitution, reveals the fact that the framers of the Constitution had in mind the creation of a system whereby the sanctity and purity of the judicial system could be constantly protected so as to avoid the possibility, so far as it might be avoided, of creating, to use the vernacular, "hand-picked judges." All propositions to give either Congress or either of its branches or the President, the individual right to create or to name judges, were rejected upon the theory that the system of nominating by the President and confirming by the Senate eliminated to a great extent the possibility of corruption, in that one would check up the other, and so when section 18 undertakes to vest in the chief judge of a circuit court or in the chief judge of the United States Supreme Court, the right to pick and bring a district court judge from some district other than that to which he has been appointed by the President and Senate, it is claimed that this is a trespass in violation of the Constitution requiring that the judges should be appointed and affirmed by the President and Senate. This view gains strength when it is borne in mind that the original revised statutes provide by section 2 of the Judiciary Law that the President shall appoint a district judge for each particular district as outlined by Congress, "with power as to business arising in said district." Thus the appointment was limited to business in the district for which the district judge was nominated and confirmed, and it was obviously the same object in view that the framers of the Constitution had in view when they said a person should be tried in the district where the crime was committed, and by a jury chosen in that district, and by a court previously ascertained and that Congress made it a high misdemeanor for a judge appointed as a district judge to reside in any district other than

that from which he was nominated. In other words, it might be argued that it had in mind guaranteeing to a litigant in a criminal case not only the right to a court previously ascertained in the district where the crime was committed, not only the right to a jury chosen from that district, but as well to a judge from that district, so that the judge as well as the jury familiar with the local conditions, might be most competent to judge of his guilt or innocence.

In Story on Constitution, Volume 2, it will be found that Story takes the view that it is manifest that the Constitution contemplated distinct appointments of the Judges of the courts of the United States, and as an authority for this, he quotes the opinion of Chief Justice Marshall and the other Judges of the United States Supreme Court in a letter which is set forth in full in the Second Volume of his work addressed to George Washington, and in which he states that the Act of Congress giving the power to a Supreme Court Judge to sit as a District or Circuit Court Judge trespasses on the constitutional right of appointment in the executive and senate. Judge Story says, at paragraph 1528 of his work:

> "It would go to make the patronage of the government subservient to private interests and bring into suspicion the motives and conduct of members of the appointing body." This language is used in reference to giving sole control to either the President or a branch of the House of Representatives, and surely it is as fully applicable to giving the right to a Circuit Judge or a Supreme Court Judge as is attempted in Section 18. Story, Section 1530—"The power may be abused—assuredly it will be abused except in the hands of an executive of great firmness, independence, integrity and public spirit. It should never be forgotten that in a Republican Government, offices are established

> and are to be filled not to gratify private interests and private attachments and not as a means of corrupt influence or individual profit. It would not therefore be a wise course to omit any precaution, which, while at the same time it should give to the President a power over the appointments of those who are, in conjunction with himself, to execute the laws, it should also interpose a salutary check upon its abuse acting by way of preventative as well as by remedy."

The argument might be made that without section 18, the business of the courts would be clogged because the Senate might not be in session to approve an appointment, but Story points out in reply to this that for this reason the Constitution gives the President the power to make recess appointments, saying at paragraph 1557,

> "There was but one of two courses to be adopted, either that the Senate should be perpetually in session in order to provide for the appointment of officers, or that the President should be authorized to make temporary appointments during the recess, which should expire when the Senate should have an opportunity to act on the subject."

Point 3: This court will at all times and may upon its own motion inquire into the jurisdiction of the court below.

The doctrine is well established that, if it appear that the court which rendered the judgment had no jurisdiction to render it, either because the proceedings under which they were taken were unconstitutional, or for any other reason, the judgment is void.

As was stated by this Court in *Ex parte* Lange, 18 Wall., 163:

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of a fundamental law in which they are embodied."

To the same effect see:

Chicago Etc., Ry. Co. vs. Willard, 220 U. S., 419.
Fore River Ship Co. vs. Hagg, 219 U. S., 275.
M. C. L. Ry. Co. vs. Swann, 111 U. S., 379.
Teel vs. Chesapeake Ry. Co., 204 Fed., 918.
Ex parte Nielsen, 131 U. S., 176.
Ex parte Seebold, 100 U. S., 371.
Mackey vs. Miller, 126 Fed., 161.

Respectfully submitted,

A. Leo Everett,
H. B. Walmsley,
Francis L. Kohlman.

LAMAR *v.* UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 895. Argued April 4, 1916.--Decided May 1, 1916.

The Circuit Court of Appeals has no power to compel a party, who has prosecuted both a direct appeal from this court under § 238, Judicial Code, and a writ of error from the Circuit Court of Appeals, to elect which method he will pursue, and, in default of his withdrawing the direct appeal, to dismiss the writ of error.

While the general rule, when this court reverses a decision of the Circuit Court of Appeals wholly on the question of its jurisdiction, is to remand the case to that court without passing upon the merits, this court has the power to, and, in exceptional cases such as the present, will, determine the merits.

While a penal provision may not be enlarged by interpretation, it must not be so narrowed as to fail to give full effect to its plain terms, as made manifest by its text and context.

A member of the House of Representatives is an officer of the United States within the meaning of § 32 of the Penal Code.

Section 32 of the Penal Code prohibits and punishes the false assuming, with the intention to defraud, to be an officer or employee of the United States; and also the doing in the falsely assumed character of any overt act to carry out the fraudulent intent whether it would have been legally authorized had the assumed capacity existed or not.

The indictment in this case clearly charges the fraudulent intent under § 32 of the Penal Code and is sufficient under § 1025, Revised Statutes.

There was proof in this case of intent to defraud, and to establish

criminality under § 32, Penal Code; and there was no error in refusing an instruction to acquit and in submitting the case to the jury.
There was no lack of jurisdiction of this case in the District Court because the trial was presided over by a judge of a different district assigned to the court for trial conformably to the act of October 3, 1913, c. 18, 38 Stat. 203.

THE facts, which involve the jurisdiction of this court, and of the Circuit Court of Appeals, the construction of § 32 of the Penal Code, and the power of assignment of a judge of one District to preside over the District Court of another district under the Act of October 3, 1913, are stated in the opinion.

Mr. A. Leo Everett and *Mr. Francis L. Kohlman*, with whom *Mr. H. B. Walmsley* was on the brief, for David Lamar:

A congressman is not an officer of the United States. Bowen's Documents of the Constitution; 1 Farrand Records of the Fed. Conv., p. 376; 3 id., pp. 597–599–620; *Blount's Case*, Wharton's St. Trials, 200; Story's Comm. on Const., 1st ed., § 791; Tucker on Const., § 199; Cong. Rec., 1914, p. 8831; H. R., 63d Cong., 2d Sess., Rep. No. 677; *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Mouat*, 124 U. S. 303; *United States* v. *Smith*, 124 U. S. 525; *Burton* v. *United States*, 202 U. S. 344; *Kelly* v. *Common Council*, 77 N. Y. 503; N. Y. Public Officer's Law, § 2, Art. 1; Am. & Eng. Enc., 2d ed., tit., "Public Officers," p. 322; *United States* v. *Wiltberger*, 5 Wheat. 76; *Hackfield* v. *United States*, 197 U. S. 442; *Martin* v. *United States*, 168 Fed. Rep. 198; *United States* v. *Barnow*, 239 U. S. 74; *United States* v. *Ballard*, 118 Fed. Rep. 757; *Mackey* v. *Miller*, 126 Fed. Rep. 161.

It was not charged or proven that the defendant pretended to act "under the authority of the United States." *United States* v. *Curtain*, 43 Fed. Rep. 433; *United States* v. *Bradford*, 53 Fed. Rep. 542; *United States* v. *Taylor*, 108 Fed. Rep. 621; *United States* v. *Ballard*, 118 Fed.

Rep. 757; *United States* v. *Brown*, 119 Fed. Rep. 482; *United States* v. *Farnham*, 127 Fed. Rep. 478; *Littel* v. *United States*, 169 Fed. Rep. 620; *United States* v. *Barnow*, 239 U. S. 74.

The indictment is defective in failing to describe the circumstances of the offense. *United States* v. *Carll*, 105 U. S. 611; *Evans* v. *United States*, 153 U. S. 584; *United States* v. *Hess*, 124 U. S. 483; *Keck* v. *United States*, 172 U. S. 434; *Moore* v. *United States*, 160 U. S. 268; *Bartell* v. *United States*, 227 U. S. 427; *Martin* v. *United States*, 168 Fed. Rep. 198.

There was no proof of an intent to defraud.

The District Court in which the defendant was tried under an indictment charging him with the commission of a crime, had no jurisdiction in view of the provisions of the Sixth Amendment.

The designation of a judge from a district in one circuit to hold a district court in another circuit trespasses upon the executive power of appointment in that it permits a United States District Judge to hold court in a district to the court of which he was not nominated by the President and confirmed by the Senate.

This court will at all times and may upon its own motion inquire into the jurisdiction of the court below. *Ball* v. *United States*, 140 U. S. 118; *Chicago &c. Ry. Co.* v. *Willard*, 220 U. S. 419; *Ex parte Lange*, 18 Wall. 163; *Ex parte Nielsen*, 131 U. S. 176; *Ex parte Seebold*, 100 U. S. 371; *Fore River Ship Co.* v. *Hagg*, 219 U. S. 275; Jud. Code, § 18; Judiciary Law, § 2; *Kentucky* v. *Powers*, 201 U. S. 1; *Kansas* v. *Colorado*, 200 U. S. 46; *Marbury* v. *Madison*, 1 Cranch, 138; *McDowell* v. *United States*, 159 U. S. 596; *Mackey* v. *Miller*, 126 Fed. Rep. 161; *M. C. L. Ry.* v. *Swann*, 111 U. S. 379; *Nashville* v. *Cooper*, 6 Waters, 247; *Norton* v. *Shelby County*, 118 U. S. 448; *Sheldon* v. *Sill*, 8 How. 441, No. 8448; 2 Story on Const., p. 1557; *Teel* v. *Chesapeake Ry.*, 204 Fed. Rep. 918.

The Solicitor General, with whom *Mr. Robert Szold* was on the brief, for the United States:

Section 32, Crim. Code, prohibits the false assumption or pretense to be a member of Congress.

The legislative history of the act reënforces this view.

A member of the House of Representatives is an officer of the Government of the United States and acting under its authority.

Members of Congress hold "office," and a member of Congress is an "officer." 2 Bouvier's Law Dict., p. 540, ed. of 1897; *Swafford* v. *Templeton*, 185 U. S. 487, 492; *The Floyd Acceptances*, 7 Wall. 666, 676; *United States* v. *Maurice*, 2 Brock. 96, 102.

The Revised Statutes of the United States recognize members of Congress as such officers. Revised Stat., §§ 1756, 1759, 1786, 2010.

Decisions of state courts and state statutes recognize members of the state legislatures as "state officers." The analogy is complete. *Morril* v. *Haines*, 2 N. H. 246, 251; *Shelby* v. *Alcorn*, 36 Mississippi, 273, 291; *State* v. *Dillon*, 90 Missouri, 229, 233; Rev. Stat., N. Y., 1829, v. 1, p. 95.

A member of Congress is a Federal and not a state officer. *Eversole* v. *Brown*, 21 Ky. Law Rep. 925, 927; *State* v. *Gifford*, 22 Idaho, 613, 632–633; *State* v. *Russell*, 10 Ohio Dec. 255, 264.

Other decisions of this court do not contravene the proposition here contended for.

It is not necessary that defendant's pretense be to act lawfully under the authority of the United States. *Littell* v. *United States*, 169 Fed. Rep. 620; *United States* v. *Ballard*, 118 Fed. Rep. 757; *United States* v. *Barnow*, 239 U. S. 74.

The indictment sufficiently particularizes the circumstances of the offense.

The defendant's objection is not one of substance, but

of form. *Evans* v. *United States*, 153 U. S. 584; *United States* v. *Barnow*, *supra*.

All substantial rights of defendant were observed. *Bartell* v. *United States*, 227 U. S. 427; *Durland* v. *United States*, 161 U. S. 306.

Section 1025, Rev. Stat., controls. *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Ledbetter* v. *United States*, 170 U. S. 606.

The proof of the intent to defraud was ample.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Charged in the trial court (Southern District of New York) by an indictment containing two counts, with violating § 32 of the Penal Code, the petitioner was convicted and on December 3, 1914, sentenced to two years' imprisonment in the penitentiary. The trial was presided over by the District Judge of the Western District of Michigan assigned to duty in the district conformably to the provisions of § 18 of the Judicial Code as amended by the Act of Congress of October 3, 1913 (c. 18, 38 Stat. 203). To the conviction and sentence in January following error was directly prosecuted from this court, the assignments of error assuming that there was involved not only a question of the jurisdiction of the court as a Federal court, but also constitutional questions. For the purpose of the writ one of the district judges of the Southern District of New York gave a certificate as to the existence and character of the question of jurisdiction evidently with the intention of conforming to § 238 of the Judicial Code.

After the record on this writ had been filed in this court a writ of error to the conviction was prosecuted in May, 1915, from the court below. In September following that court, acting on a motion to dismiss such writ of error on

the ground that its prosecution was inconsistent with the writ sued out from this court, entered an order providing for dismissal unless the plaintiff in error within ten days elected which of the two writs of error he would rely upon and subsequently before the expiration of the time stated the court declined to comply with the request of the plaintiff in error that the questions at issue be certified to this court. On October 29, 1915, the election required of the plaintiff in error not having been made, the writ of error was dismissed.

On January 31, 1916, the writ of error prosecuted from this court came under consideration as the result of a motion to dismiss, and finding that there was no question concerning the jurisdiction of the trial court within the intendment of the statute and no constitutional question, the writ was dismissed for want of jurisdiction. 240 U. S. 60. Thereupon the plaintiff in error in the court below asked that the cause be reinstated and heard and upon the refusal of the request an application was made to this court for leave to file a petition for mandamus to compel such action and if not, for the allowance of a certiorari, and although the former application was denied, the case is here because of the allowance of the latter remedy.

Primarily the question is, Was it the duty of the court below to exercise jurisdiction? As under the statute it is indisputable that there was jurisdiction and the duty to exert it unless the conditions existed which authorized a direct writ of error from this court, it follows that the dismissal by this court of the direct writ for want of jurisdiction affirmatively determined that there was jurisdiction in the court below and error was committed in not exerting it unless by some neglect to avail of proper procedure or because of some line of inconsistent conduct the right to invoke the jurisdiction of the court below was lost. As we have seen, the assumed existence of the latter cause was the basis of the refusal to exercise jurisdiction, that is,

the inconsistency which it was assumed resulted from prosecuting the direct writ of error from this court and subsequently suing out the writ of error from the court below from which it was deduced that there was a duty to elect between the two as a prerequisite to the right to ask at the hands of the court below the exertion of the jurisdictional authority cast upon it by law. But if the exercise of the assumed duty of election which was imposed had resulted in the abandonment of the writ from the court below, there would have been nothing left upon which the jurisdiction of that court could have been exerted, and it is hence apparent that in substance the order was but a direction that the plaintiff in error abandon the direct writ prosecuted from this court as a prerequisite to his right to invoke the action of the court upon the writ pending before it. But aside from the demonstration of error which arises from the mere statement of this inevitable result of the order made by the court below, it is equally clear that such order rested upon a misconception arising from treating as one, things which are distinct, that is, the existence of authority to compel the abandonment of one of two valid and available remedies because of their inconsistency, leaving therefore the one not abandoned in force, and the want of power to compel an election of one of two remedies where the exertion of judicial power alone could determine which of the two was available and where therefore the exercise of the election ordered in the nature of things involved the power to destroy all relief and thus frustrate the right of review conferred by the statute by one or the other of the remedies. As in view of this distinction it clearly results that the determination of the plaintiff in error to abandon under the order of the court one or the other of the two writs of error could not have validated the writ not abandoned if it was not authorized by law, it must follow that the election to which the order of the court submitted the plaintiff in error was

not real and therefore afforded no basis for the refusal of the court to determine the validity of the writ of error pending before it and to decide the case if it deemed it had jurisdiction. Indeed, if it be conceded that the situation arising from the pendency of the two writs created doubt, that concession would not change the result since we are of opinion that the power to have certified to this court the jurisdictional or other questions as to which the doubt existed was the remedy created by the statute to meet such a situation and to obviate the possibility of denying to the plaintiff in error the right to a review which again it must be borne in mind the statute gave under one or the other of the two writs.

Correcting the error committed by the court below by its order of dismissal, the case on its merits is within our competency to decide as the result of the operation of the certiorari. As, however, it is clear that the questions on the merits, as demonstrated by the previous judgment of dismissal of the direct writ of error, are of a character which under the statute if they had been disposed of by the court below in the discharge of its duty would have been finally determined, and as it is equally apparent that none of the questions except the one of jurisdiction, that is, the duty of the court below to have decided the cause, are within the exceptional considerations by which certiorari is allowed, it follows that in order to give effect to the statute our duty would be as a general rule having corrected the error resulting from the dismissal and having afforded a remedy for the failure of the court below to exercise jurisdiction, to go no farther and remand the case so that the questions at issue might be finally disposed of. *Lutcher & Moore* v. *Knight*, 217 U. S. 257. But while not in any degree departing from the general rule, we think it is inapplicable here because of the serious doubt which may have been engendered by the certificate as to the jurisdictional question given by the district judge,

although it is now established that there was no foundation whatever for allowing it, and because of the resulting complexity of the question as to whether the jurisdiction of this court had not attached to the subject-matter and excluded the advisability if not the power on the part of the court below to certify to this court the question of which writ of error was paramount, when of necessity a certificate involving the solution of that question had already been made by the district judge. We therefore dispose of the merits, restating the case so far as may be essential.

The section of the Penal Code charged to have been violated punishes anyone who "with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any Department, or any officer of the Government thereof any money, paper, document, or other valuable thing," etc. The indictment charged that at a stated time the petitioner "unlawfully, knowingly and feloniously did falsely assume and pretend to be an officer of the Government of the United States, to-wit, a member of the House of Representatives of the Congress of the United States of America, that is to say, A. Mitchell Palmer, a member of Congress representing the Twenty-sixth District of the State of Pennsylvania, with the intent, then and there, to defraud Lewis Cass Ledyard," and other persons who were named and others to the grand jury unknown, "and the said defendant, then and there, with the intent and purpose aforesaid, did take upon himself to act as such member of Congress; against the peace," etc., etc.

We consider the contentions relied upon for reversal separately.

1. It is insisted that no offense under the statute was stated in the indictment because a member of the House of Representatives of the United States is not an officer acting under the authority of the United States within the meaning of the provision of the Penal Code upon which the indictment was based. This contention is supported by reference to what is assumed to be the significance in one or more provisions of the Constitution of the words "civil officers," and reliance is specially placed upon the ruling made at an early day in the *Blount Case* (Wharton's State Trials, p. 200) that a Senator of the United States was not a civil officer subject to impeachment within the meaning of § 4 of Article II of the Constitution. But, as previously held in sustaining the motion to dismiss the direct writ of error, the issue here is not a constitutional one, but who is an officer acting under the authority of the United States within the provisions of the section of the Penal Code under consideration? And that question must be solved by the text of the provision, not shutting out as an instrument of interpretation proper light which may be afforded by the Constitution and not forgetting that a penal statute is not to be enlarged by interpretation, but also not unmindful of the fact that a statute because it is penal is not to be narrowed by construction so as to fail to give full effect to its plain terms as made manifest by its text and its context. *United States* v. *Hartwell*, 6 Wall. 385, 395; *United States* v. *Corbett*, 215 U. S. 233, 242, 243.

Guided by these rules, when the relations of members of the House of Representatives to the Government of the United States are borne in mind and the nature and character of their duties and responsibilities are considered, we are clearly of the opinion that such members are embraced by the comprehensive terms of the statute. If however considered from the face of the statute alone the question was susceptible of obscurity or doubt—which

we think is not the case—all ground for doubt would be removed by the following considerations: (a) Because prior to and at the time of the original enactment in question the common understanding that a member of the House of Representatives was a legislative officer of the United States was clearly expressed in the ordinary, as well as legal, dictionaries. See Webster, *verbo* office; Century Dictionary, *verbo* officer; Bouvier's Law Dictionary (edition of 1897) Vol. 2, page 540, *verbo* legislative officers; Black's Law Dictionary (2nd edition) page 710, *verbo* legislative officer. (b) Because at or before the same period in the Senate of the United States after considering the ruling in the *Blount Case*, it was concluded that a member of Congress was a civil officer of the United States within the purview of the law requiring the taking of an oath of office. (Cong. Globe, 38th Congress, 1st session, pt. 1, pp. 320–331.) (c) Because also in various general statutes of the United States at the time of the enactment in question a member of Congress was assumed to be a civil officer of the United States. Revised Statutes, §§ 1786, 2010, and subdivision 14 of § 563. (d) Because that conclusion is the necessary result of prior decisions of this court and harmonizes with the settled conception of the position of members of state legislative bodies as expressed in many state decisions. *The Floyd Acceptances*, 7 Wall. 666, 676; *Ex parte Yarbrough*, 110 U. S. 651, 654; *Wiley* v. *Sinkler*, 179 U. S. 58, 64; *Swafford* v. *Templeton*, 185 U. S. 487, 492; *People* v. *Common Council*, 77 N. Y. 503, 507–508; *Morril* v. *Haines*, 2 N. H. 246; *Shelby* v. *Alcorn*, 36 Mississippi, 273, 291; *Parks* v. *Soldiers' Home*, 22 Colorado, 86, 96.

2. But it is urged, granting that a member of Congress is embraced by the word officer, yet no offense was stated since it was not charged that in pretending to be an officer the accused did an act which he would have been authorized to do under the authority of the United States had he

possessed the official capacity which he assumed to have. In other words, the proposition is that the first clause of the section prohibits the falsely assuming or pretending to be an officer with intent to defraud and as such officer taking upon himself to act under the authority of the United States, that is, to do an authorized act. The contention which the proposition covers was insisted upon not only in the demurrer which was overruled, but by requests to charge and exceptions to the charge given. While it is undoubtedly true that the construction asserted finds some apparent support in one or more decided cases in district courts of the United States (*United States* v. *Taylor*, 108 Fed. Rep. 621; *United States* v. *Ballard*, 118 Fed. Rep. 757; *United States* v. *Farnham*, 127 Fed. Rep. 478), we are of opinion that it misconceives the statute and fails to give it proper effect because when rightly construed the operation of the clause is to prohibit and punish the falsely assuming or pretending, with intent to defraud the United States or any person, to be an officer or employee of the United States as defined in the clause and the doing in the falsely assumed character any overt act, whether it would have been legally authorized had the assumed capacity existed or not, to carry out the fraudulent intent. Briefly stated, we conclude this to be the meaning of the clause for the following reasons: (a) Because the words "acting under the authority of the United States" are words designating the character of the officer or employee whose personation the clause prohibits since if the words are thus applied, the clause becomes coherent and free from difficulty, while if on the other hand they are applied only as limiting and defining the character of the overt act from which criminality is to arise, confusion and uncertainty as to the officer or employee whose fraudulent simulation is prohibited necessarily results. (b) Because the consequence of a contrary construction would be obviously

to limit the application of the clause as shown by its general language and as manifested by the remedial purpose which led to its enactment. (Cong. Rec. vol. 14, pt. 4, p. 3263, 47th Cong. 2d Sess.) (c) Because to adopt a contrary view would be absolutely inharmonious with the context, since it would bring into play a conflict impossible of reconciliation. To make this clear it is to be observed that the last clause of the section makes criminal the demanding or obtaining in the assumed capacity which the first clause prohibits, "from any person or from the United States, . . . any money, paper, document, or other valuable thing, . . ." We say which the first clause prohibits because there is no reëxpression of the prohibition against assuming or pretending contained in the first clause except as that prohibition is carried over and made applicable to the second by the words "or shall in such pretended character demand," etc. As it is obvious that the acts made absolutely criminal by the second clause are acts which may or may not have been accomplished as the result of exerting in the pretended capacity an authority which there would have been a lawful right to exert if the character had been real and not assumed, it results not only that the conflict which we have indicated would arise from adopting the construction claimed, but the error of such contention as applied to the first clause is conclusively demonstrated.

Indeed the consideration thus given the contention in question was unnecessary because its error is persuasively if not conclusively established by the ruling in *United States* v. *Barnow*, 239 U. S. 74. In that case the accused was charged under both clauses of the section with having on the one hand falsely assumed to be an employee of the United States acting under the authority of the United States, "to wit, an agent employed by the government to sell a certain set of books entitled 'Messages and Papers of Presidents'" and with having taken

upon himself to act as such by visiting a named person for the purpose of carrying out the intended fraud, and on the other hand under the second clause of the section with having by means of the same false personation obtained a sum of money. The case came here to review the action of the court below in sustaining a demurrer to the indictment as stating no offense because there was no authorized employee of the character which had been falsely assumed and no legal authority therefore to have done the overt acts with which either count was concerned. The judgment was reversed under the express ruling that the existence of the office or the authority was not essential as the assuming or pretending to be and act as an officer or employee of the United States was within the purview of the statute and necessarily embraced within its prohibitions.

3. It is urged that the indictment is defective because of its failure to describe the circumstances of the offense. It suffices to say that after considering them we think that the many authorities cited to support the contention are wholly inapplicable to the conditions disclosed by the record and we are further of opinion that those conditions make it clear that the contention is devoid of merit. We say this because it will be observed from the text of the indictment which we have previously reproduced that it clearly charges the illegal acts complained of and the requisite fraudulent intent, states the date and place of the commission of the acts charged and gives the name and official character of the officer whom the accused was charged with having falsely personated. It is moreover to be observed that there is not the slightest suggestion that there was a want of knowledge of the crime which was charged or of any surprise concerning the same, nor is there any intimation that any request was made for a bill of particulars concerning the details of the offense charged. Under this situation we think that

the case is clearly covered by § 1025, Revised Statutes. *Connors* v. *United States*, 158 U. S. 408, 411; *Armour Packing Co.* v. *United States*, 209 U. S. 56, 84; *New York Central R. R.* v. *United States*, 212 U. S. 481, 497; *Holmgren* v. *United States*, 217 U. S. 509, 523.

4. It is insisted that there was no proof whatever tending to show an intent to defraud or to establish criminality under the section relied upon and therefore there should have been an instruction to acquit. In so far as the proposition concerns the absence of proof of the doing of an overt act which was authorized by law and therefore relates to the wrongful construction of the statute which we have previously pointed out, it is disposed of by what was said on that subject. As to the want of any evidence justifying the submission of the case to the jury on the question of the criminal intent relied upon or of the acts charged, we content ourselves with the statement that after a close scrutiny of the record we are of the opinion that the contention is wholly without merit and that the case was clearly one where the proof was of such a character as to justify its being submitted to the jury for its consideration.

5. Finally we come to consider a contention not raised in the trial court, not suggested in the court below while the case was there pending and before the order of dismissal which we have reviewed was entered, and not even indirectly referred to in this court when the case was pending on the direct writ of error which writ was, as we have seen, dismissed because it presented for consideration no question of jurisdiction and none arising under the Constitution. Indeed the contention now relied on was for the first time urged in a supplemental brief filed on the present hearing. The proposition is that the trial court had no jurisdiction, in fact that no such court existed, because the trial was presided over by the District Judge of the Western District of Michigan assigned to the

Southern District of New York conformably to the statute (Oct. 3, 1913, c. 18, 38 Stat. 203) and that the effect of such assignment under the statute was virtually to destroy the Southern District of New York by creating a new district whose boundaries were undefined, thus violating the rights secured to the accused by the Sixth Amendment since he was subjected to trial in a district not established when the offense with which he was charged was committed. In fact the further contention is made that to assign a judge of one district and one circuit to perform duty in another district of another circuit was in substance to usurp the power of appointment and confirmation vested by the Constitution in the President and Senate. As to the first of these contentions, we think it suffices to say that it rests upon a construction of the words of the statute authorizing the assignment of a judge of one district and circuit to duty in another district and circuit which is wholly unfounded and which rests upon a premise conflicting with the practice of the Government under the Constitution substantially from the beginning. As to the second contention, we think merely to state it suffices to demonstrate its absolute unsoundness.

Affirmed.

MR. JUSTICE MCREYNOLDS took no part in the consideration and decision of this case.